

No. 84-4-CFX
Status: GRANTED

Title: Williamson County Regional Planning Commission, et
al., Petitioners
v.
Hamilton Bank of Johnson City

Docketed:
July 2, 1984

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Sweeney, M. Milton

Counsel for respondent: Nebel, G. T.

Entry	Date	Note	Proceedings and Orders
1	Jul 2 1984	G	Petition for writ of certiorari filed.
2	Jul 2 1984		Appendix of petitioner Williamson Co., et al. filed.
3	Aug 4 1984		Brief of respondent Hamilton Bank of Johnson City in opposition filed.
4	Aug 8 1984		DISTRIBUTED. September 24, 1984
5	Oct 1 1984		Petition GRANTED. *****
6	Nov 15 1984		Brief of petitioners Williamson Co., et al. filed.
7	Nov 15 1984	G	Motion of National Association of Counties, et al. for leave to file a brief as amici curiae filed.
8	Nov 15 1984		Brief amicus curiae of California, et al. filed.
9	Nov 15 1984		Brief amicus curiae of St. Petersburg, FL filed.
10	Nov 15 1984		Brief amicus curiae of New York City filed.
11	Nov 15 1984		Brief amicus curiae of United States filed.
12	Nov 22 1984	D	Motion of California, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
13	Nov 29 1984	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
14	Dec 3 1984		Motion of National Association of Counties, et al. for leave to file a brief as amici curiae GRANTED.
15	Nov 30 1984		Opposition of respondent to motion of California, et al. for leave to participate in oral filed.
16	Dec 10 1984		Motion of California, et al. for leave to participate in oral DENIED.
17	Dec 10 1984		Motion of the Solicitor General for leave to participate in oral GRANTED.
18	Dec 10 1984		Joint appendix filed.
19	Dec 13 1984		Brief amicus curiae of Pacific Legal Foundation filed.
20	Dec 13 1984		Brief amicus curiae of California Building Industry filed.
21	Dec 13 1984		Brief amicus curiae of National Apartment Assn. filed.
22	Dec 14 1984		Brief amicus curiae of American College of Real Estate Lawyers filed.
23	Dec 14 1984		Brief amicus curiae of Irvine Company filed.
24	Dec 14 1984		Brief of respondent Hamilton Bk. of Johnson City filed.
25	Dec 29 1984		Record filed.
26	Jan 4 1985		SET FOR ARGUMENT. Tuesday, February 19, 1985. (3rd case).

Entry	Date	Note	Proceedings and Orders
27	Jan 10 1985		CIRCULATED.
28	Feb 2 1984		One box of exhibits received.
29	Feb 19 1985		ARGUED.
30	Feb 14 1985	G	Motion of petitioner for leave to file reply brief, out-of-time, filed.
31	Feb 25 1985		Motion of petitioner for leave to file reply brief, out-of-time, GRANTED. Justice Powell OUT.

84-4

No. _____

Office - Supreme Court, U.S.

FILED

JUL 2 1984

ALEXANDER L. STEVAS.

CLERK

In THE
Supreme Court of the United States
OCTOBER TERM, 1983

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,
Petitioners,
v.
HAMILTON BANK OF JOHNSON CITY,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether or not the Sixth Circuit Court of Appeals, by two-to-one split decision (Kennedy and Keith for the majority, Wellford dissenting) has misinterpreted the *San Diego Gas & Electric Co. v. City of San Diego* case, 450 U.S. 621 (1981) by inferring a holding which is not contained within that decision, so that a purported temporary interference with an investor's profit expectation constitutes an unconstitutional "temporary" taking under the Fifth Amendment of the United States Constitution such that money damages should be allowed. The majority's opinion is apparently based upon an implication contained in the *San Diego Gas* case as a result of a one-line remark contained in that opinion by Justice Rehnquist.

2. Whether, as here, a regional planning commission, which has been found to have acted in good faith, granting to a developer due process, both substantive and procedural, in the enforcement of validly enacted zoning ordinances and subdivision regulations, can be found to have violated a developer's Fifth Amendment rights by a temporary interference with profit-backed expectations, especially where such rights were supposedly obtained by submitting a preliminary plat for preliminary approval, which on the face of the plat itself indicates the approval is limited in scope as to the total number of dwelling units approved preliminarily on that plat, and which plat violates both the *original* zoning ordinances and subdivision regulations in effect at the time the development of the subdivision began and the later amended zoning ordinances and subdivision regulations against which the Bank is complaining.

3. Whether a lower court's ruling on a judgment notwithstanding the verdict should be overturned by a Court of Appeals when it is obvious that the majority in the split opinion has ignored facts upon which the lower court relied and has erroneously interpreted the facts as clearly contained in the transcript and appendix presented to that court.

OTHER PARTIES NOT LISTED IN THE CAPTION

WILLBURN H. KELLEY, JR., County Judge
MITCHEL BEARD, Planning Commission Member
ROBERT MEDAUGH, Planning Commission Member
JACK MEAGHER, Planning Commission Member
JOE BAUGH, Planning Commission Member
CAROLYN WATERS, Planning Commission Member
KENNETH MCNEIL, Planning Commission Member
CHARLES MOSLEY, Planning Commission Member
MORTON STEIN, County Planner
THAYER MARTIN, County Engineer

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IN THE
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OCTOBER TERM, 1983

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WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL

Petitioners

v.

HAMILTON BANK OF JOHNSON CITY

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Petitioners Williamson County Regional Planning Commission, et al, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported. However, it is reprinted in the Appendix hereto at pp. 3a-22a. The order and memorandum of the district court granting the judgment notwithstanding the verdict is not reported. However, it is reprinted in the Appendix hereto at pp. 23a-28a.

JURISDICTION

The opinion of the Court of Appeals was rendered on March 7, 1984. Thereafter, a timely petition for panel rehearing and suggestion for rehearing en banc was denied on April 20, 1984. (App. 1a). By order dated May 3, 1984, the court below stayed its mandate until July 2, 1984. This petition for certiorari was filed within 90 days of entry of the order denying the petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit which overturned the District Court's granting of a Judgment Notwithstanding the Verdict (App. 3a-22a). To facilitate an understanding of the important issues implicated in this case, before reciting the underlying facts material to consideration of the questions presented, Petitioners will briefly overview the historical development and background of the northern portion of Williamson County, Tennessee, which is sought to be developed as a part of this case and the enactment of the zoning ordinances which would allow for the special use sought to be approved by the Respondent and its predecessors in this case.

A. Historical Overview

Beginning in the early 1960's, when Metropolitan, Nashville, Davidson County, Tennessee began growing and increasing in population, one of the most popular areas for suburban growth was in the northern portion of Williamson County, which abuts the southern boundaries of Nashville, Davidson County. From a geographical standpoint, portions of northern Williamson County contained beautiful rolling farmland, and fairly steep hills of various types of soil composition. Once the prime land for subdivision development, which consisted of one acre plus lots and ranch style homes, covered most of the large tracts available in northern Williamson County, developers sought ways to develop other areas which contained some level-to-gently rolling land and steep hillsides which had been thought to be non-developable.

As the result of that growth, certain developers began, in 1972, to propose to the Williamson County Court, now the Williamson County Commission (the legislative body of that county) that a change be made in the zoning ordinances to allow for a development which is commonly known as "planned unit development" or "cluster housing". This type of development, which had been successful in other parts of the country, would allow the inclusion of certain land not necessarily devel-

opable for residential housing to meet the density requirements of the zoning ordinances by clustering the living units closely together and maintaining the other property for open space for the use and benefit of the residents of the developments.

As a result of the efforts of several developers seeking to get approval for such cluster homes or planned unit developments, an ordinance was enacted by the Williamson County Commission to amend its zoning ordinances to allow for such developments. Since that enactment, there have been several cluster or planned unit developments approved in Williamson County, most of which have been successfully completed.

The new zoning ordinance was enacted by the Williamson County Commission in 1972. At that time, an individual or developer seeking approval of a development was required to come before the Williamson County Regional Planning Commission for the preliminary approval of what was called an "initial sketch plan". The initial sketch plan, as the title connotes, was a very limited plan in regards to any engineering data that might ultimately relate to ability to get approval of either a final plat or a building permit for an individual building lot. The purpose of the initial sketch plan was to allow the Planning Commission, the county planner, and the developer to review the proposed development to determine whether or not it *generally* appeared to be in conformance with the zoning ordinances and subdivision regulations.

It should be noted that the subdivision regulations, as opposed to the zoning ordinances, were adopted by the Planning Commission, whereas the zoning ordinances were adopted by the Williamson County Court or the County Commission. Under the scheme of things, the Planning Commission could grant certain variances to the subdivision regulations, but had no authority or power to grant any variances to the zoning ordinances.

Once a developer received preliminary approval of the sketch plan, he could then proceed to have the engineering data com-

pleted showing all necessary details as to roadgrade, utility installation and the like and present it to the Planning Commission for final plat approval. Once final plat approval had been obtained and the developer had either (a) posted a bond equal to the cost of the necessary improvements for utilities and roadways to complete that portion sought to be finally platted, or (b) had actually installed the improvements, then he could obtain final plat approval to be recorded in the county register's office. It was only then that a developer was allowed to sell building sites.

The zoning ordinances and subdivision regulations for Williamson County were changed from time to time. The zoning ordinances were changed by the Williamson County Commission in 1979. The change impacted somewhat on the development of the project which is the subject of this action. The subdivision regulations which were controlled by the Planning Commission were also changed from time to time, which also impacted somewhat on the development. The underlying problems with the development which constituted a part of the Planning Commission's ultimate denial of approval of a newly submitted plat in part were effected by those changes, but *primarily* were based on the zoning ordinances and subdivision regulations originally in effect at the time the first initial sketch was preliminary approved.

Other factors, uncontrolled by and unrelated to the Planning Commission, seriously affected the progress of the development. They included: 1) a condemnation of approximately 18 1/2 acres by the State of Tennessee of the originally proposed development for inclusion in the Natchez Trace Parkway, for which the developer was compensated; 2) sale of the golf course property which had previously been dedicated to the county under an open space easement to be held primarily for the benefit of the residents of the development, and 3) the insolvency of the original developer which terminated in the foreclosure upon him by the respondent Hamilton Bank of Johnson City in the fall of 1980.

B. The Underlying Controversy

The original developer of the property in question sought and obtained initial sketch plan approval from the Planning Commission on February 1, 1973 for a development to be known as the Temple Hills Country Club Estates. The original total project as represented on that preliminary sketch plan indicated that there were 676 acres in the proposed development. Of that 676 acres, 287 acres were designated for dwelling unit lots, while 129 acres were designated for *future* development. In addition, the initial preliminary sketch plan showed actual dwelling units presented in *this* sketch plan as 469, and as allowable dwelling units for future development, 267 units. In addition to those figures, the initial sketch plan upon which the respondent now claims certain vested rights, contained certain areas designated for future development. These areas as shown on the initial sketch plan contained a note that read:

"THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION."

Also, the notes to the plan, and particularly Note No. 9 thereto, provides:

"PARCELS WITH NOTE 'THIS PARCEL NOT TO BE DEVELOPED BY THE PLANNING COMMISSION' NOT A PART OF THIS PLAT AND NOT INCLUDED IN GROSS AREAS."

This plat with these notes was revised and reapproved in May 1973 and June 1974. No further action was taken on the total plan, although certain sections did receive final approval in 1974 and 1975, until the initial sketch plan was reapproved preliminarily in June 1975. There was no further reapproval of the preliminary plan until April 1978, and again until April 1979. At no time during that reapproval process of the preliminary plan were the notes as referred to above ever deleted or changed, and no approval was sought for the development of the areas marked for future development.

It was not until June 1981 that the respondent, Hamilton

Bank of Johnson City, sought approval of a preliminary plat from the Planning Commission. This was after the Bank had been forced to foreclose on the prior developer, and did in fact bid the remaining undeveloped property in at foreclosure sale in November 1980.

It was in June 1981, for the first time, that a *new* plat was presented to the Planning Commission by the Bank which showed proposed development in those areas previously noted:

"NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION."

It is as a result of these new proposed developments, in areas previously reserved, that the controversy arises. In addition, the controversy arises because additional engineering data, which was not previously presented to the Planning Commission, showed roadgrades in certain areas to be far in excess of those permitted under the previously enacted subdivision regulations. The engineering data showed slopes on portions of the land that were impermissible for building sites. Such land was required to be included in the open space under the original zoning ordinance. While the proposed plat was turned down for eight reasons, some of which may or may not have been reasons growing out of the ordinances and regulations existing in 1973 when the first initial sketch was approved, most of those reasons were based on the original regulations and ordinances. The approval process involving the initial sketch plan, lacked the engineering data mentioned above. Such matters would only have been brought before the Commission at such time as final plat approval was sought. This had never been done.

The Bank now takes the position that simply because the original preliminary sketch showed 676 acres, it is entitled to develop 736 units. This total is based strictly upon a mathematical calculation on the density formula provided in the original zoning ordinance. This calculation does not take into consideration the portion of the property required by the ordinance to be deducted from the gross area, nor the fact that a portion of the property no longer belongs to the development, i.e., that por-

tion having been condemned by the State. The Bank also totally ignores the fact that the original sketch plan clearly states on the face of it that certain parcels were not to be developed until subsequent approval was obtained from the Planning Commission, as well as the fact that the actual number of dwelling units approved on that plat was only 469.

The Bank has, since the initial turndown of its preliminary plat in 1981, made no genuine attempt whatsoever to correct the deficiencies pointed out to it. The Bank proceeded, it is suggested, with all deliberance to keep the plat in such a form that it would not be approved by the Planning Commission. The Bank, in fact, spent most of its time, energy and resources hiring engineers to testify at trial that, because of the eight reasons given by the Planning Commission for turning it down, it was now economically impossible to develop the plat. It never attempted to present any proposal to the Planning Commission of any viable alternative which could meet any of the zoning ordinances and subdivision regulations enacted in 1973, by which this Respondent must comply. It is submitted that the Bank realized that it had foreclosed upon a piece of property, or in fact had made loans upon a piece of property, that was not developable under any set or circumstances, under any ordinances or subdivision regulations. The Bank simply sought to create a scenario by which it could claim damages and recover such damages from the people of Williamson County by alleging and arguing that the amended zoning ordinances and subdivision regulations, not the original ordinances and regulations in effect when the subdivision was begun in 1973, were the factors preventing approval of the plat it submitted in 1981. In August 1981, the Bank proceeded to file suit against the Williamson County Regional Planning Commission, its members, the county planner, the county engineer and the county executive for its supposed damages as a result of the Planning Commission's action. It was only after the trial, and in an attempt to settle the question as to the estoppel issue, that the Bank made any attempt to redesign its proposed plan. When the plan was redesigned, the Planning Commission did, on March 10, 1983, grant a preliminary approval of a new plat.

C. The Judicial Procedure Below

The Bank filed a petition in 1981 in the United States District Court for the Middle District of Tennessee pursuant to Title 42 U.S.C. §§ 1983, 1985, and 1988, seeking relief and damages as a result of the Planning Commission's refusal to approve its new preliminary plat. After three weeks of testimony and hundreds of exhibits being introduced into evidence, the jury retired and was given certain form interrogatories to be completed, over the objection of the defendants as to the form and content. These were returned to the Court on April 20, 1982. The defendants timely filed a motion for Judgment Notwithstanding the Verdict which was granted by the District Court Judge on June 4, 1982 (App. 23a-28a). In addition to the final Order of the Court granting the Judgment Notwithstanding the Verdict, an injunction was issued by the Court pursuant to the Court's finding as to the equitable estoppel issue. (App. 29a-30a). Appeal was then had by the Respondent Hamilton Bank to the Court of Appeals for the Sixth Circuit, as well as by the Planning Commission as to the injunctive relief. The appeal as to the injunctive relief, having since been voluntarily dismissed by agreement between the Bank and the Planning Commission, resulted in the approval of a preliminary plat that would allow for the continuation of the development of the remaining property at Temple Hills.

REASONS FOR GRANTING THE WRIT

- A. The contrary decision of the Court of Appeals below conflicts with the prior rulings of this Court and numerous other Courts of Appeals, so that it is now unclear as to the rights of developers regarding the function of regional planning commissions across the country. This uncertainty in the law has the potential of subjecting regional planning commissions to billions of dollars in damages heretofore not thought to be available to developers as a result of the legitimate exercise of authority by such planning commissions. To allow the decision of the Court of Appeals for the Sixth Circuit to stand in this case will have such an absolute chilling effect upon plan-

ning, as to make orderly and necessary planning of communities totally chaotic to the extent that there may be no more control for orderly growth, or protection of the property rights of the citizens who have relied upon valid zoning ordinances and subdivision regulations and their vigorous enforcement.

- B. That the issue of damages appropriate in a Fifth Amendment temporary taking has never been ruled upon by this Court, although in several prior decisions this Court has earnestly expressed a desire to resolve the question.

The reasons presented for granting this writ of certiorari, denoted as A. and B., are so closely related that they will be discussed together to avoid unnecessary repetition.

The questions presented by this writ are of such exceptional importance, transcending the particular factual situation and the parties below, that the entire planning scheme of every local governing authority across this country will be severely impacted as a result of the split holding, of the Sixth Circuit Court of Appeals. This is especially true considering the factual basis upon which the Court of Appeals basically turns the dissent of the *San Diego Gas* case¹ into the controlling law, at least for the Sixth Circuit. It is without question that this decision will impact upon all of the other circuits even though there are conflicts in those circuits. To allow the dissent in the *San Diego Gas* case to become law and to be interpreted to mean that a developer is entitled to monetary damages for any temporary interference by a planning commission, will effectively eliminate any control over any development from that date forward. Given the facts presented in this case, no planning commission member, anywhere, would risk the attendant liability to enforce any subjective interpretation of any subdivision regulations, zoning ordinances or building codes against any developer. This is not to say that in a proper case that monetary damages may not be appropriate. It is to say that in the case

¹*San Diego Gas & Electric Co., v. City of San Diego*, 450 U.S. 621 (1981).

based upon these factual circumstances, to allow this decision to stand would ultimately destroy any orderly planning and control of property development in these United States.

As both the majority and dissenting opinions in this case and numerous other decisions by other circuits have indicated, the Supreme Court has not yet set a clear standard as to what conduct amounts to a taking under the Fifth Amendment to the Constitution. Further, the Supreme Court has not yet determined what the appropriate remedy for a taking would be, especially where the taking is "temporary in nature". Because of what is believed to be well meant dicta in *San Diego Gas*, both by the majority and the dissenting opinion, planning commissions across this country, as well as developers, find themselves dealing in a twilight zone. It is submitted that no justice had previously caused so much uncertainty as to the law concerning this issue until Justice Rehnquist said, "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." Exactly what Justice Rehnquist meant by that statement and how Justice Rehnquist would now rule on the issue, if it be presented to the Court by virtue of this writ of certiorari, can only be determined if the Court grants this writ. The Petitioners assert that Judge Wellford in his well-reasoned dissenting opinion clearly shows that Justice Rehnquist would decide the case contra to the majority opinion as a result of the opinion issued in the case of *Loretto v. Teleprompter of Manhattan, CATV Corp.*, 102 S.Ct. 3164 (1982).

This issue must now be decided by the Supreme Court. The groundwork has been previously laid by the prior decisions of this Court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981), *Loretto v. Teleprompter of Manhattan CATV Corp.*, 102 S.Ct. 3164 (1982). From this line of cases, various circuits have found various implications and interpretations. The result is contrary decisions among the various circuits.

In a recent case from the First Circuit Court of Appeals, *Cita-*

del Corp. v. Puerto Rico Highway Authority, 695 F.2d 31 (1st Cir. 1982), the court dealt with the problem left by the *San Diego Gas* case and held that federal courts may enjoin such unconstitutional conduct on the part of states in an inverse condemnation proceeding, but they may *not* award damages. In a footnote² in that decision, the court precisely points out the problem left by *San Diego Gas*, which has arisen once again in this case.

The Seventh Circuit contra to the First Circuit in *Barbian v. Panagis*, 694 F.2d 476, 482 n. 5 (7th Cir. 1982), interprets the Rehnquist statement as being a concurring opinion that calls upon the "entire community" to share in compensation for a property owner's loss. In that case, at Footnote 5, the Court of Appeals for the Seventh Circuit says:

"Thus, on the Taking Clause question, the dissent in *San Diego Gas* reflects the view of a majority of the Court. See *Devines v. Maier*, 665 F.2d 138, 142 (7th Cir. 1981).

²*Id.* at 33 n. 4. Since our decision in *Pamel*, the Supreme Court has decided *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). It appears that at least eight of the justices may disagree with our unwillingness to characterize oppressive regulation as a taking, see 450 U.S. at 628 n. 8; *id.* at 651-53 (Brennan, J., dissenting, but only four would find that such a taking requires compensation, see *Id.* at 653-58 (Brennan, J., dissenting)). It may be that Justice Rehnquist's concurrence should be taken as a fifth vote in favor of compensation, see *Id.* at 633-34 (Rehnquist J., concurring), but deriving enough direction from his brief comment in support of "much of what is said" by Justice Brennan to abandon our position that the constitution does not require compensation in this case seems to be carrying judicial tea leaf reading to an uncalled-for extreme. In any event, none of the justices addressed the issue of federal court ordered compensation, since the lower court in *San Diego Gas* was a state court. Even if the constitution is read to require compensation in an inverse condemnation case, the Eleventh Amendment should prevent a federal court from awarding it. See *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974); *Knight v. State of New York*, 443 F.2d 415 (2d Cir. 1971); *Beck v. State of California*, 479 F.Supp. 392 (C.D. Cal. 1979); *Nasrallah v. Barcelo*, 465 F.Supp. 1273 (D.P.R. 1979).

The Fifth Circuit in *Frazier v. Lowndes County, Miss., Board of Education*, 710 F.2d 1097 (5th Cir. 1983) decision, is a case which, if the court had followed the dissent in *San Diego Gas* as interpreted by the Sixth and Seventh Circuits, would have reached a contra decision and granted damages for a temporary taking, but it did not do so. In that case, in a situation where the taking issue was presented to the court, the court relied upon the cases which the Supreme Court had decided by majority opinion, i.e., *Agins v. City of Tiburon*, 447 U.S. 255, and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, and held that the proper remedy is one of estoppel.

The inconsistencies now existing in the circuits are sufficient to require this writ of certiorari be granted in order to resolve this conflict.

C. That the majority of the Court of Appeals erroneously interpreted the evidence presented to it and erroneously interpreted the "implicit" holding of the *San Diego Gas* case.

The United States Supreme Court has never *explicitly* held that the regulations which *permanently* deprive an owner of all reasonable beneficial use of his property constitutes a "taking" of that property and, *a fortiori*, has never held that regulations which *temporarily* deprive an owner of *some* reasonable beneficial use of his property constitutes a "taking" of the property. The courts have found, however, that where restrictions do constitute a "taking" of property because it precluded a reasonable use, the remedy has been to invalidate the regulations that place such restrictions upon the property. This is not to say that there has been any deprivation of the Bank's rights in this case.

The decision in *Agins v. City of Tiburon*, 447 U.S. 255, (1980), is very close in point to the factual situation concerned in the present case. In the *Agins* case, there had not been submitted a plan for development of the property. It is submitted that the same exact situation exists in this case, for the Bank has not presented a plan for development that is in compliance with either the zoning ordinances and subdivi-

sion regulations in effect in 1973 nor with those in effect in 1980-81. In the *Agins* case the court refers in Footnote 9 to the issue presented as follows:

... Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

Id. at 263 n. 9.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), although the court found that the regulation involved did amount to a "taking", the remedy was to invalidate the regulation rather than award compensatory damages or mandate formal condemnation of the property.

It is suggested that there is no authority whatsoever to find a "taking" where, as in this case, the property owner cannot establish its rights under earlier ordinances and regulations. If the property cannot now be developed under either the set of regulations in effect in 1973 when the subdivision was begun, or in 1981 when the plat under controversy here was submitted, then there cannot be a "taking" of any type. It is the topography of the land that is left for development after the condemnation of 18.5 acres that prevents its development from yielding as large a number of buildable units as the Bank desires.

In this case, both the district court and the jury found that the bank received all prerequisite due process, both substantive and procedural; further, the district court found that the zoning ordinances and subdivision regulations as applied by the Planning Commission to the plat submitted by the Bank were "rationally applied". Before there can be a "taking", there must be

some right or thing in existence, to which a person is entitled to protection, which is diminished or removed from that person or entity. Without some prior approval of a plat for that portion of the property, the Bank acquired no rights which could be violated. *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590 (1962); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); and *Gorieb v. Fox*, 274 U.S. 603 (1927).

The majority opinion of the court below also states that there was no remaining economically viable use of the Bank's property, and based that finding solely on the testimony of the Bank's expert, Mr. Hunt, whose testimony was based upon the interpretations given to him by the Bank's employee, Mr. Ragsdale. The majority finds, "[a]s there was no convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use" (Pg. 8 of the opinion) (App. 10a). The majority totally ignores the testimony of other qualified experts. Mr. Mort Stein, the county planner, and Mr. Thayer Martin, the county engineer, testified that the property could be developed so that approximately 558 building units could be located thereon and still satisfy the Planning Commission's eight objections to the plat that the Bank submitted in June 1981.

The majority below even concedes that if there could be 336 additional units built on the property, then the development would retain economically viable use. (See Footnote 5, page 8, of the majority's opinion). Judge Wellford, in his dissent, after apparently fully examining the record, finds, "Examination of the record before us, however, indicates that it was virtually conceded that even applying 1979 standards, a total of 548 would be approved on the property." The figure of 548, less the 212 already platted and approved, equal 336 additional building sites. As the majority concedes, this number would constitute a viable economic use.

As Judge Wellford points out, "the cases cited by the majority do not, in my view, support the result which they reach." (dissenting opinion, Pg. 19), and in particular, he cites the perti-

nent holding of *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd after remand*, 699 F.2d 734 (1983), in support of his position.

CONCLUSION

Planning commissions, or their counterparts in local governments across this country, as well as developers, now face a dilemma in making even the most miniscule decision regarding any proposed real estate development. Because of the various interpretations of the *San Diego Gas* case, which have lead to various circuits having their own interpretation of what constitutes a taking under the Fifth Amendment of the Constitution, as well as what constitutes an appropriate remedy therefor, this issue must be resolved by this Court. The contrary decision below, taken in light of other conflicting decisions by other circuits, injects such confusion and uncertainty into this important area of this nation's economic growth that this Writ of Certiorari must be granted to settle this reccuring and important question of constitutional law.

The majority opinion below has only compounded this problem by erroneously analyzing the facts and interpretation of the law and application of that law to the facts. A Writ of Certiorari should issue to correct the judgment below and to set a uniform standard for all the circuits to determine under the Fifth Amendment of the United States Constitution when, where and under what circumstances an unconstitutional *permanent* and/or *temporary* "taking" of property without just compensation occurs.

It is further submitted that this is a proper case for this Court to summarily reverse the decision of the court below and reinstate the final decision of the District Court in its granting of the Judgment Notwithstanding the Verdict.

Respectfully submitted,

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84-42

Office - Supreme Court, U.S.
FILED

JUL 2 1984

ALEXANDER L. STEVENS
CLERK

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent

**APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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3289

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1a

No. 82-5388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAMILTON BANK OF JOHNSON CITY,

O R D E R

Plaintiff-Appellant,

v.

WILLIAMSON COUNTY

REGIONAL PLANNING COMMISSION, ET AL.,

Defendants-Appellees. _____

_____/

Before: KEITH, KENNEDY, and WELLFORD, Circuit Judges.

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

John P. Heleman

Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAMILTON BANK OF JOHNSON CITY, <i>Plaintiff-Appellant,</i>	ON APPEAL from the United States Dis- trict Court for the Middle District of Tennessee, Nashville Division.
v.	
WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al., <i>Defendants-Appellees.</i>	

Decided and filed March 7, 1984

Before: KEITH, KENNEDY, and WELLFORD, Circuit Judges.

KENNEDY, Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 15-21) filed a separate dissenting opinion.

KENNEDY, Circuit Judge. Hamilton Bank of Johnson City appeals from a judgment that as a matter of law it is not entitled to damages for a temporary taking of its property under the fifth and fourteenth amendments. Hamilton's claims arise from appellee Williamson County Regional Planning Commission's refusal to allow Hamilton to complete construction of a residential subdivision.

I

Hamilton is the successor in interest of the developers of a tract of land in Williamson County, Tennessee. In 1973, Wil-

liamson County changed its zoning ordinances to permit cluster residential developments. Under cluster development houses may be built on smaller lots than would otherwise be allowed, upon the condition that sufficient land within the development be left as "open space." In 1973 the planning commission approved a preliminary plat for a proposed cluster development covering 676 acres, to be known as Temple Hills Country Club Estates. A notation on the approved plat indicated that the total number of allowable dwelling units on the tract was 736. However, lot lines were only drawn in for 469 units; the areas in which the remaining 267 units were to be placed were left blank and bore the notation "this parcel not to be developed until approved by the planning commission." The planning commission minutes reflect that the plat was approved after considerable discussion of whether the plat complied with density requirements. The plat was apparently in compliance under one interpretation of the zoning regulations, but not under an alternate interpretation. There was also some disagreement over the method to be used in calculating slopes in order to determine whether the development would violate the requirement that lots not be placed on slopes greater than 25%. The total number of units approved by the planning commission is in dispute. Hamilton introduced at trial a letter signed by six members (a majority) of the 1973 planning commission stating that 736 units had been approved.

Development of the project began. The developers dedicated an easement of open space to the county covering about 245 acres, most of which was to be used as a golf course, they built roads, and they installed sufficient utility lines to accommodate the entire development. Before construction was actually commenced on any particular section, a final plat for that section was submitted for approval by the planning commission. Between 1973 and 1979, the commission approved final plats for several sections. The preliminary plat was also reapproved several times between 1973 and 1979. A witness for Hamilton testified that the developers spent

three to five million dollars for improvements to the property during this time.

In 1977, the zoning regulations were changed. The planning commission continued to apply the 1973 regulations to Temple Hills, however, since the project had originally been approved under those standards. This policy changed in 1979, when the planning commission decided to consider plats submitted for renewal under the regulations then in effect rather than those in effect when initial approval had been given. On August 16, 1979, the plat was renewed under the 1979 regulations.

In October 1980, the plat was again submitted to the planning commission for approval. This time the plat was disapproved, for two reasons: non-compliance with density requirements, and lots placed on slopes greater than 25%. In November 1980, Hamilton through foreclosure acquired the property that had not yet been developed and sold. Hamilton submitted a preliminary plat, which apparently included plans for development of the 258 remaining undeveloped acres by building 476 dwelling units to bring the development's total to 688. The planning commission disapproved this plat on June 18, 1981, listing eight objections.

Hamilton then brought this action against the planning commission under five theories: (1) taking without just compensation; (2) violation of procedural due process; (3) violation of substantive due process; (4) denial of equal protection; and (5) estoppel under state law from not allowing the project to proceed.

After a trial, the District Court granted the planning commission's motion for a directed verdict on the substantive due process and equal protection claims. The case was submitted to the jury on the remaining theories. The jury returned a verdict with answers to special interrogatories to the effect that Hamilton had not been denied procedural due process, but had been denied economically viable use of its property in violation of the just compensation clause of the fifth

amendment, and that the planning commission was estopped under state law from requiring Hamilton to comply with the present zoning regulations as opposed to the 1973 regulations. The jury assessed damages against the planning commission in the amount of \$350,000 for the temporary taking of Hamilton's property for the period from the disapproval of the plat to the time of trial.

The District Court issued a permanent injunction which required the planning commission to apply the 1973 regulations to Temple Hills consistently with its prior decisions, to approve the plat submitted in 1981, and to comply with ten specific requirements governing its future actions toward Temple Hills.

The District Court then granted judgment notwithstanding the verdict in favor of the planning commission on the taking issue. The court found the evidence sufficient to support the verdict that there had been a taking, but held that judgment on the taking issue would be inconsistent with the jury's finding that the planning commission was estopped from applying current regulations. The court reasoned that:

Any damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law. Because the state law itself prevents continued application of those regulations, there can be no taking of property prohibited by the Just Compensation Clause of the Fifth Amendment.

The District Court also modified its permanent injunction to merely enjoin the planning commission from applying post-1973 regulations to Temple Hills, and denied Hamilton's motion for attorney fees.

Hamilton appeals from the judgment notwithstanding the verdict and asks this Court to order judgment based on the jury's damage award. Alternatively, Hamilton argues that the directed verdict on the substantive due process and equal protection claims was in error and requests a remand for

trial on those issues. Hamilton also argues that it is entitled to its attorney fees.

II

This Court has held that:

On a motion for judgment n.o.v. as on a motion for a directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. . . . Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal.

O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975). We must view the evidence in the light most favorable to Hamilton, drawing from that evidence all reasonable inferences in Hamilton's favor. *Pike v. Benchmark Mfg. Co.*, 696 F.2d 38, 40 (6th Cir. 1982); *National Polymer Prods. v. Borg-Warner Corp.*, 660 F.2d 171, 178 (6th Cir. 1981). The District Court's judgment on the taking issue must, therefore, be reversed if the evidence supports an award for a taking of Hamilton's property without just compensation within the meaning of the fifth amendment. We thus turn to that question.

The Supreme Court has not set forth a clear standard by which to determine whether particular conduct amounts to a "taking" under the fifth amendment.¹ Resolving this question generally requires an ad hoc, factual inquiry. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

A taking does not require an actual physical occupation of the property or formal condemnation proceedings. *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983). The Supreme

¹The taking clause of the fifth amendment applies to the states through the fourteenth amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

Court established in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that governmental regulation affecting an owner's use of his property may constitute a taking.² In *Pennsylvania Coal*, a statute prohibited mining coal in such a way as to cause a residence to subside, where the owner of the underground mining rights was not the owner of the surface habitation rights. The Court employed a practical economic analysis to determine that application of the statute effected a taking, saying: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414.

The taking clause was more explicitly held applicable to zoning regulation in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Court there held that:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 227 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 36 (1978).

447 U.S. at 260. The Court in *Agins* also held that restricting the spread of urbanization was a legitimate governmental purpose. Since this purpose was served by the planning commission's actions now in dispute,³ our inquiry must focus

²The Supreme Court has consistently recognized, at least implicitly, that governmental regulation without physical occupation may effect a taking. See *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

³The planning commission does not claim that its actions were necessary to prevent an immediate and serious hazard to the safety or property of the community. The state may require destruction of property that poses such a hazard without paying compensation. *Miller v. Schoene*, 276 U.S. 272 (1928).

upon whether Hamilton has been denied economically viable use of its land.

It is well established that there is no taking merely because the owner's best or most profitable use of the property has been denied. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). It is similarly true that diminution in property value alone does not constitute a taking. *Penn Central*, *supra*; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The District Court instructed the jury concerning these points, and also told the jury that "there can be no impermissible taking within the meaning of the Fifth Amendment if the regulations as applied permit economically viable use of the property." Tr. at 2015. See *Penn Central*, *supra*.

The property in question in this case is the as yet undeveloped portion of a residential subdivision. The subdivision as a whole was originally a farm, but the land is generally very hilly and rocky except for the land presently being used for the golf course. An appraiser testified at trial that the land is not suitable for farming or any use other than subdivision development, and that applicable zoning laws would in any event not permit any other use. Indeed, there is no suggestion in the record or from the parties of any alternative, economically viable use for Hamilton's property other than residential. The same appraiser also testified that, if the property were to be developed in accordance with the eight objections listed by the planning commission when it denied approval of Hamilton's development plan, only 67 sites could be used for residences, thus forcing Hamilton to eliminate 409 potential building sites from its proposal to develop 476 additional units. Were Hamilton to complete the development and be able to sell only 67 sites, it would sustain net losses of over one million dollars because of the cost of satisfying the planning commission's eight objections. The appraiser's conclusion, therefore, was that the land had no

remaining significant value.⁴ As there was no convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use.⁵

The planning commission's primary contention on appeal, however, is not that the property retains an economically viable use but rather that Hamilton has never submitted a plat that complies with either the 1973 or the 1977 regulations, and thus never acquired rights in developing the property that could have been taken away by the commission.

The planning commission's argument fails. It is based on factual premises that are inconsistent with the jury's find-

⁴Since the evidence is that the land owned by Hamilton was left with no remaining significant value, this case is distinguishable from those cases in which mere diminutions in value have been held not to constitute takings because economically viable uses remained.

⁵The dissent in its second paragraph seems to imply that the testimony that the planning commission's objections would only allow Hamilton to construct 67 additional units is incredible: "[I]t was virtually conceded that even applying 1979 standards a total 548 units would be approved on the property. Thus elimination of even 409 potential units would leave a substantial number yet to be developed." We have difficulty understanding the dissent's use of these numbers. The 1979 density requirements which would permit at most 548 units on the entire development (of which a part (212 units) is already developed and not owned by Hamilton) were only one of the planning commission's eight objections. Had this been the planning commission's only restriction on development, Hamilton would apparently have been free to build 336 units in addition to the 212 extant to bring the development's total to 548. (The dissent incorrectly juxtaposes a number referring to the total number of units in the entire development (548) with the number of units (409) that the planning commission's restrictions eliminated from Hamilton's plan to develop 476 units on the undeveloped portion now owned by Hamilton.) If 336 additional units had been permitted, the land may very well have retained an economically viable use. However, the planning commission also listed seven other objections to Hamilton's proposal. The appraiser considered all eight restrictions and concluded that they allowed at most 67 units on Hamilton's property. There is no evidence inconsistent with the appraiser's reasoning or conclusion, and his testimony was sufficient to allow the jury to find that with the eight restrictions Hamilton's property had no remaining economically viable use.

ings regarding the state law estoppel claim. The District Court instructed the jury on the estoppel issue as follows:

[I]f you find that [Hamilton] in good faith made a substantial change in position or incurred extensive obligations and expenses in reliance upon the previous approval of the Temple Hills project by the [planning commission] so that it would be inequitable and unjust to destroy the right to develop Temple Hills which [Hamilton] had acquired, then you should . . . find that the [planning commission was] estopped or prevented from exercising [its] regulatory powers in such a way as to deprive [Hamilton] the right to develop the Temple Hills project.

The jury returned a verdict in favor of Hamilton on the estoppel issue. It must, therefore, have found that Hamilton had acquired a right to develop Temple Hills according to the plats that had been submitted. There is sufficient evidence in the record to support such a finding. The planning commission approved plans for the development on numerous occasions, and there is considerable evidence that the planning commission intended to and did approve a maximum of 736 units.

Even if Hamilton had not had a vested right under state law to finish the development, its claim that a taking occurred would not necessarily be foreclosed. Instead of looking to see whether "rights" have been destroyed, the Supreme Court in zoning cases has engaged in an economic analysis of the degree of interference with "investment-backed expectations." "The economic impact of the regulation, especially to the degree of interference with investment-backed expectations, is of particular significance." *Loretta v. Teleprompter Manhattan CATV Corp.* 102 S. Ct. 3164, 3171 (1982). See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 & n.27 (1978). The jury was entitled to find that Hamilton and its predecessor in interest had a reasonable expectation that the development could be completed, in light of the evidence that the commission ap-

proved the preliminary plats on numerous occasions with the knowledge that a total of 736 units were intended. This was the developers' "primary expectation concerning the use of the parcel," *Penn Central*, 438 U.S. at 130, and was backed by considerable investment in land and improvements.

The District Court found that there had been a "significant" interference with investment-backed expectations, but nevertheless held that the evidence did not support a taking because it considered the taking verdict inconsistent with the estoppel verdict. In its memorandum opinion the court discussed two reasons for finding the jury's taking verdict unsupported. First, the court reasoned that the estoppel verdict made the denial of property only a temporary one, which could not constitute a fifth amendment taking. A temporary deprivation of property, however, can be a taking and "should be analyzed according to the same framework applied to permanent irreversible 'takings.'" *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting). See also *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Second, the District Court apparently concluded as a matter of law that the application of zoning regulations in a manner impermissible under state law, as established by the estoppel verdict, could not be a taking.⁶ This argument is belied by the cases which consistently indicate that the application of the zoning laws, rather than the mere existence of a valid zoning ordinance, may effect a taking. *Agins v. Ti-*

⁶Carried to its extreme, a holding that a deprivation of property in a manner inconsistent with state law cannot be a taking would have the result in most states that there never could be a taking without just compensation in violation of the fifth amendment. Since most state constitutions prohibit takings without just compensation, see list at 2 Nichols on Eminent Domain § 6.1[3] nn.28 & 29 (1982 & Supp. 1983), such takings would always be inconsistent with state law in those states.

buron, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property" may effect a taking (emphasis added).); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd after remand*, 699 F.2d 734 (1983). Since it is the application of the laws or regulations which effectuates the taking, it makes no difference for fifth amendment purposes whether the particular application is consistent with state law.⁸

Although an unlawful application of zoning regulations can constitute a taking, the question remains whether damages are an appropriate remedy. This question was presented to the Supreme Court in *San Diego Gas & Electric Co. v. City*

⁷In *Agins v. Tiburon*, 447 U.S. 255 (1980), the plaintiffs claimed that the enactment of zoning ordinances which restricted plaintiffs' use of their property constituted a taking. The Supreme Court held that there had as yet been no taking because the plaintiffs had not submitted a development plan and the ordinances therefore had not been applied to the plaintiffs. The plaintiffs were thus "free to pursue their reasonable investment expectations by submitting a development plan to local officials." 447 U.S. at 262. Hamilton is in a different position, having submitted a plan which was disapproved for reasons which imply disapproval of any plan which would fulfill Hamilton's reasonable investment-backed expectations.

⁸The irrelevancy of the taking's validity under state law is illustrated by *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). In that case, the developer of a condominium project claimed that his property had been taken when he was denied permission to finish the project, after obtaining approval of his plans and constructing common improvements and part of the condominiums, because the zoning laws had been restrictively amended. A state court, in a separate suit, had declared application of the zoning amendments invalid. The appeal of the state court suit had not yet been decided. Although the Third Circuit held that no taking had occurred because the property retained considerable value, its value having been reduced by the zoning amendments from about three million dollars to about two million dollars, it did not consider the possibility that the invalidity of applying the zoning amendments would preclude a finding that a taking had occurred. See also *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983) (redevelopment plan undertaken by authority of state Rehabilitation Act, but in violation of that act, effected compensable takings under fifth amendment); *Urbanizadora Versailles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983) (temporary "freezing" of property in violation of state law held a taking).

of *San Diego*, 450 U.S. 621 (1981). There the Court was asked to rule that a state must provide damages to a landowner who has suffered a regulatory taking. The California court had held that only injunctive relief was available. Although this question was not answered by the majority of the Court, which held the case non-justiciable for lack of a final order, it was discussed by Justice Brennan in his dissent. The dissent was joined in by four justices. Justice Rehnquist, concurring with the majority, said specifically that he "would have little difficulty agreeing with much of what is said in the dissenting opinion of Justice Brennan," 450 U.S. at 633-34; and the majority opinion itself noted that the constitutional merits of the claim were "not to be cast aside lightly," *id.* at 633.

The dissent, which therefore represented the views of a majority of the Court on this issue, reasoned that the language of the fifth amendment prohibits taking without just compensation, and so a constitutional violation has occurred as soon as an uncompensated taking is effected. The government's duty to pay compensation then arises from the constitutional violation, not from any implied promise or agreement. The dissenting opinion also looked to the purposes of the just compensation clause, stating:

Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.

Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. . . . If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it. The payment of just compensation serves to place the landowner in the same position mone-

tarily as he would have occupied if his property had not been taken.

450 U.S. at 655-57 (footnotes deleted). Justice Brennan therefore thought that:

[O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

450 U.S. at 653 (footnotes deleted). We agree with Justice Brennan's reasoning and hold that compensation must be paid for a temporary regulatory taking.

The jury's finding that the planning commission effected a taking of Hamilton's property was therefore supported by the evidence, and judgment notwithstanding the verdict was improper. The jury was correctly instructed on the question of damages under the theory of a temporary taking and awarded \$350,000 in damages. This amount is supported by expert testimony, so Hamilton is entitled to the jury's verdict and judgment should be entered in its favor for \$350,000.

III

The District Court granted directed verdicts in favor of the planning commission on Hamilton's substantive due process and equal protection claims. On appeal, Hamilton now argues that these rulings were in error. However, Hamilton presents these arguments as an alternative to its taking claim and asks for no relief beyond that requested under the taking claim. In light of our decision on the taking question, therefore, we need not reach these issues.

Hamilton also appeals the District Court's denial of attorney fees under 42 U.S.C. § 1988. That statute by its terms provides that an award of attorney fees is a matter for the

discretion of the court. We must, therefore, remand the case so that the District Court may exercise its discretion in determining whether Hamilton is now entitled to attorney fees.

Accordingly, the judgment of the District Court is reversed and remanded for proceedings consistent with this opinion.

WELLFORD, Circuit Judge, dissenting.

I would agree with the majority's conclusion that "the Supreme Court has not set forth a clear standard by which to determine whether particular conduct amounts to a 'taking' under the fifth amendment."¹ I would also agree with its conclusion that "the purpose served by the Planning Commission's actions now in dispute . . . [is] . . . a legitimate public purpose." It seems clear that depriving the owner of the most profitable use of land and the fact that governmental planning or zoning action substantially diminishes the value of land does not amount to a taking. *Penn. Central Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1936).

The testimony of the Bank's expert, Hunt, in this case was that if the Planning Commission's actions, as interpreted by the Bank's employee (Ragsdale) would admit only 67 additional building sites on the contested property, and would eliminate 409 potential building sites from the development plan, there would be a loss in excess of \$1,000,000 to the developer. Hunt was of the opinion, based on this assumption, that the property would have no significant market value "other than that which someone would pay for open space." Examination of the record before us, however, indicates that it was virtually conceded that even applying 1979 standards a total 548 units would be approved on the property. Thus, the elimination of 409 potential units would leave a substantial number yet to be developed. There was no evidence of a

¹"There is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), cited by the dissent in *Loretto v. Teleprompter Manhattan CATV Corp.*, —U.S.—, 102 S. Ct. 3164, 3179 (1982).

formal request by appellant for a variance to permit as many as 267 additional allowable dwelling units for future development as set out on the original 1973 preliminary plat and approved by the Planning Commission on later occasions; rather, appellant insisted that it had vested rights to develop 409 (or more) potential units. In sum, evidence in the case does not clearly indicate to me that economically viable use of the property was denied.

Even if the jury verdict in this case did establish a temporary deprivation and a denial of economically viable use of a part of the property, as apparently the district judge concluded that it did, I would agree with his ultimate holding that "... the temporary interference with the plaintiff's development backed expectations and any temporary diminution in value of the property, whether styled as a 'temporary taking' or otherwise, . . . is essentially a question of law." He concluded that under the circumstances plaintiff was not entitled to damages as a matter of law since it could proceed under 1973 zoning regulations by reason of estoppel. Defendants, moreover, have insisted all along that plaintiff has never been in compliance with the 1973 zoning laws and regulations pertaining to allowable slope (building on a lot in excess of 25 degree slope not permitted) and with respect to some reduction of allowable units on the property because of elimination of some of the acreage by reason of its acquisition by a public authority for other purposes.

This case is really a quarrel over to what extent a "cluster" development of residential units is permitted on a parcel of land. The zoning ordinances or regulations on their face do not amount to a taking of the Bank property, which was acquired with notice of the application of these ordinances and regulations made by defendants. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). I agree with the trial judge's conclusion that there has not been any taking requiring judgment under the Fifth Amendment.

Even if the appellants' ability to sell their property was limited during the pendency of the condemnation pro-

ceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939). See *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (CA 8), cert. denied, 444 U.S. 899 (1979); *Reservation Eleven Associates v. District of Columbia*, 136 U.S.App.D.C. 311, 315-316, 420 F.2d 153, 157-158 (1969); *Virgin Islands v. 50.05 Acres of Land*, 185 F.Supp. 495, 498 (V.I. 1960); 2 J. Sackman & P. Rohan, *Nichols' Law of Eminent Domain* § 6.13[3] (3d ed. 1979).

Agins, n.9 at 263.

The judgment of the California Supreme Court in *Agins* that the sole remedies available in an inverse condemnation claim, arising out of zoning activity similar to that made by the Bank here, were mandamus and declaratory judgment, was not disturbed by the United States Supreme Court.

There has been no physical invasion by defendants of plaintiff's property, either temporary or permanent. A "taking" of the property can be less readily found under these circumstances. *Penn Central Transp.* at 124; *Loretto v. Teleprompter, supra*.

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt)

Penn Central Transp. Co., at 125.

The Supreme Court in *Agins* did not decide whether the state (or defendants in this case acting as agents of the state) must pay damages to a landowner when claiming a taking under a regulatory ordinance, because it found no taking had been established. That same issue arose in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), and Justice Blackmun, writing for the majority, stated, "we again must leave the issue undecided." 450 U.S. at 623, and see n.9 at 629. I do not interpret Justice Rehnquist's concurring opinion in *San Diego* as adopting the reasoning of the minority four Justices in that case, that a temporary taking by reason of regulatory actions pursuant to zoning ordinances should be viewed in the same fashion as a permanent taking. Justice Rehnquist states only: "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633 (emphasis added). See also, *Loretto v. Teleprompter, supra*, wherein the majority² pointed out:

The Court concluded [in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958)] that the temporary though severe restriction on use of the mines was justified

102 S.Ct. at 3174.

The Supreme Court seems to imply that in a temporary taking where there is no invasion, physical occupation, or "seizure and direction" by the state of the landowner's property, no compensation is mandated. *Central Eureka* is cited, as apparently still good law in *Teleprompter*, 102 S.Ct. at 3174. In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), where 87½% of value was taken by an ordinance precluding existing use, no compensation was found due.

Even if the trial judge reached his decision that compensa-

²Justice Brennan, dissenting; Justice Rehnquist with the majority.

tory damages were not allowable on the rationale that the zoning regulations were being applied in a manner inconsistent with Tennessee law, I would conclude that he, nevertheless, reached the right decision. Properly considered, there was questionable evidence in this case, at best, that all economically viable uses of the property had been even temporarily taken, or that reasonable "investment-backed expectations" had been arbitrarily eliminated. Plaintiff succeeded, moreover, in obtaining a declaratory judgment and injunction requiring that 1973 ordinances and regulations apply to future development of its property. I would not disturb the district court's decision in that respect.

In summary, I would conclude that the effects of defendants' actions did not "completely deprive the owner of all or most of [its] interest in the property." *San Diego*, 450 U.S. at 653. See, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). I would conclude further than even a temporary deprivation of the Bank's "investments-backed expectations" under the circumstances here does not establish an entitlement to compensatory damages. I do not agree that Justice Brennan's dissent in *San Diego* represents the views of a majority of the Supreme Court on this issue. The majority has not cited a single case allowing compensatory damages in a case where there has been a temporary interference with a landowner's right to develop his property in some economically viable fashion by reason of zoning actions, not involving an invasion of the property, occupation of it, or temporary seizure and possession of it.

Cases cited by the majority do not, in my view, support the result which they reach. *Urbanization Versailles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983), for example, held that a landowner whose property had been completely frozen by state zoning and regulatory actions, was entitled to declaratory and injunctive relief, but not to compensatory damages. *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), held that no taking at all had occurred. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v.*

General Motors Corp., 323 U.S. 373 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), all involved condemnation actions by the federal government for complete temporary taking of a fee, or a leasehold, or part of a leasehold. All are inapposite here. *United States v. Cansbey*, 328 U.S. 256 (1946), involved the setting aside of a Court of Claims award for a taking because of airplane overflights. The pertinent holding in *Hernandez v. City of Lafayette*, is as follows:

However, in cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to a result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification, [by petitioning for rezoning, or contesting the initial general zoning regulation prior to its passage] we conclude that a "taking" does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.

During the pendency of such proceedings to review and correct a zoning classification that denies an owner any economically viable use of his property, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" *Agin v. City of Tiburon*, 447 U.S. at 262-63 n.9, 100 S.Ct. at 2142-43 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed.2d 240 (1939). Accord, *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), cert. denied, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979); *Reservation Eleven Associates v. District of Columbia*, 420 F.2d 153, 157 (D.C. Cir. 1969).

643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd after remand*, 699 F.2d 734 (1983).

In a footnote, the court further stated:

We believe that such a rule is consistent with the "weight of authority . . . that in order to constitute a taking, the condemnor must have an intention to appropriate . . ." *Porter v. United States*, 473 F.2d 1329, 1336 (5th Cir. 1973). *Accord*, *J. J. Henry Co. v. City State*, 411 F.2d 1246, 1249 (Ct.Cl. 1969). The City of Lafayette under the circumstances of this case would lack an intention to deny plaintiff an economically viable use of his property until it was put on notice that its zoning regulations were effecting such a denial. *But see San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).

Thus, for the reasons stated, I respectfully dissent from the opinion of the majority and would affirm the decision of the district judge.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

HAMILTON BANK OF JOHNSON CITY,

vs.

CIVIL ACTION NO. 81-3567

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL

MEMORANDUM

Presently pending before the Court are defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Also pending is defendants' motion to reconsider or amend the Judgment of Permanent Injunction. For the reasons discussed below the defendants' motion for judgment notwithstanding the verdict will be granted on the issue of whether plaintiff has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment. Pursuant to the reasoning discussed below, the motion will be denied as to the verdict that defendants are estopped under state law from applying the present regulations rather than those applicable in 1973.¹ Upon reconsideration, the Judgment of Permanent Injunction entered May 6, 1982, will be ORDERED withdrawn and the Judgment of Permanent Injunction issued in an accompanying order.

¹ Formal findings of fact and conclusions of law are not required in decisions on motions under FED. R. CIV. P. 50(b), however, the District Court should render an opinion justifying its actions. *Garrison v. Jervis B. Webb Co.*, 583 F.2d 258, 261 n.3 (6th Cir. 1978). The grounds for denial of a new trial motion under Rule 50(c)(1) must be specified.

This matter came for hearing on April 5, 1982, and continued until April 21, 1982. At the close of plaintiff's evidence, defendants moved for a directed verdict on all issues. The motion was taken under advisement and judgment reserved by the Court until the close of all the evidence. At the close of all the evidence, defendants renewed their motion. The Court held that defendants had rationally applied applicable ordinances and regulations in this matter. The Court further found that the plaintiff had not been denied substantive due process nor had the plaintiff been denied equal protection and directed the verdict for defendants on these issues. The Court instructed the jury and provided a special verdict form requiring them to answer five questions. As a result of the jury's deliberation, the jury found that the plaintiff had not been denied procedural due process and had been given a fair hearing before the Williamson County Regional Planning Commission. The jury further found that the members of the Planning Commission and other named defendants had acted reasonably and in good faith.

The jury returned a verdict that the plaintiff had been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment. The jury also found that the Williamson County Regional Planning Commission should be estopped under state law from requiring plaintiff to comply with present zoning regulations as opposed to the regulations in effect in 1973.

Upon receipt of the verdict the Court was concerned with potential inconsistency between the jury's verdicts finding a Fifth Amendment taking and, at the same time, finding that the defendants were estopped from requiring compliance with the present as opposed to the 1973 regulations. Reflecting the Court's concern with this possible inconsistency in instructing the jury as to damages, the Court instructed the jury to award damages only for a "temporary taking" and nominal damages. The jury returned a verdict of damages in the amount of \$348,945.50 for the "temporary taking" and nominal damages in the amount of \$1,054.50.

The Court in considering defendants' present judgment

notwithstanding the verdict motion must consider all of the evidence in the light most favorable to the plaintiff and refrain from weighing conflicting testimony. *Price v. Firestone Tire and Rubber Company*, 321 F.2d 725 (6th Cir. 1963); see, *Cecil Corley Motors Co. v. General Motors Corp.*, 380 F. Supp. 819 (M.D. Tenn. 1974). However, such a motion raises a question of law which must be dealt with by the Court. Viewing the evidence under the applicable standard, the Court concludes that, as a matter of law, there was insufficient evidence upon which the jury could conclude that defendants violated the Just Compensation Clause of the Fifth Amendment, in light of the verdict that, under state law, defendants are estopped from requiring plaintiff to comply with the present rather than the 1973 regulations.

Under the jury's verdict the applicable state law on estoppel prevents defendants from requiring plaintiff's compliance with the present regulations. Thus, the result of defendants' attempts to enforce the present as opposed to the 1973 regulations amounted to a temporary deprivation of the use of the property anticipated under the 1973 regulations.

The question of what constitutes a taking for Fifth Amendment purposes has never been answered explicitly by the United States Supreme Court but rather has been left to be determined through essentially ad hoc factual inquiries. *Penn Central Transportation Company, et al v. City of New York*, 438 U.S. 104, 123-124 (1978). In addition to the character of the governmental action, relevant factors to be considered include the economic impact of the regulation on the claimant and the extent of the resulting interference with investment backed expectations. The dissent in the *Penn Central* case points out that the standards by which to weigh these factors are not absolutely clear. *Id.* at 149 n. 13 (Rehnquist, J., dissenting). However, the Supreme Court does make it clear in *Penn Central* that its decisions sustaining land-use regulations which are reasonably related to promoting the general welfare "uniformly reject the proposition that diminution in property value, standing alone, can con-

stitute a 'taking'." *Id.* at 131. More recently, in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 2141 (1980), the Court stated that the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. In the present case, this Court determined at the close of the proof that the regulations in question advance legitimate state interests and directed the verdict for defendants on the issues of substantive due process and equal protection. That left for the jury, under the taking analysis of *Agins*, only the question of denial of economically viable use in violation of the Fifth Amendment.

Viewing the evidence in the light most favorable to plaintiff, there was a showing of a significant interference with investment-backed expectations under the present regulations as opposed to the 1973 regulations. Under the reasoning of *Penn Central*, the Court would have difficulty determining that such interference and resulting diminution in property value amounts to a taking. However, given the verdict on the estoppel issue, the Court has no difficulty determining that such temporary interference with investment-backed expectations and temporary diminution in value does not constitute a taking for which compensation is required under the Fifth Amendment. Any damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law. Because the state law itself prevents continued application of those regulations, there can be no taking of property prohibited by the Just Compensation Clause of the Fifth Amendment. As part of this analysis, of course, the Court has concluded that, under the proper standard of review of the evidence, the jury's verdict on the estoppel issue under state law should not be disturbed.

Obviously, the Court will grant a motion for judgment notwithstanding the verdict only after the most careful consideration. The Court observes that the case was well tried by able attorneys before a conscientious jury. However, the ju-

ry's finding that plaintiff was denied economically viable use of its property in violation of the Just Compensation Clause of the Constitution is not supported by the evidence under the applicable standard of review. The jury was entitled to conclude under the evidence that there was a temporary diminution in value of the property and damages associated, among other things, with the delay of plaintiff's project. To reiterate, however, such evidence supports only the conclusion that the denial of economically viable use was temporary until such a time as defendants were estopped from requiring compliance with the present regulations. Such a temporary denial, even when associated with substantial costs to plaintiff in the amount allowed by the jury as compensation for the "temporary taking," does not, as a matter of law, constitute a taking under the Fifth Amendment.

Pursuant to FED. R. CIV. P. 50(c) (1), the Court will conditionally deny defendants' motion for a new trial. The Court has found no errors at trial which could be remedied upon retrial nor other available evidence which, in fairness, should be presented to a new jury. All factual issues were fully and properly tried. The question of whether the temporary interference with the plaintiff's development backed expectations and any temporary diminution in value of the property, whether styled as a "temporary taking" or otherwise, amounts to a taking in violation of the Fifth Amendment is essentially a question of law. The relevant facts to which this question of law must be applied could not be further or more fairly developed upon re-trial.

The Court has carefully considered the arguments of the parties pertaining to difficulties in complying with the Judgment of Permanent Injunction entered May 6, 1982. The purpose of such equitable relief is to enforce the jury's verdict which estopped defendants from requiring plaintiff to comply with the present regulations rather than the 1973 regulations. Therefore, the Court will withdraw the previous injunction and issue an injunction which simply requires the defendants to apply the 1973 regulations to the Temple Hills development. Any application by defendants of regulations

other than the 1973 regulations would be violative of this injunction. The Court will not countenance attempts to impose regulations which the jury has determined may not be imposed under state law. However, legitimate technical questions of whether plaintiff meets the requirements of the 1973 regulations are capable of resolution through the applicable state and local procedures of appeal. *See e.g. TENN. CODE ANN. §13-7-108.* This Court should not attempt to assume the functions of a "court of zoning appeals" to review every question of the technical application of the 1973 regulations. *See, Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 464 (D. Md. 1978).

The ORDER entered by this Court on June 3, 1982 at 2:30 p.m. is in accordance with the reasoning of this memorandum.

This the 4th day of June, 1982.

John T. Nixon

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

HAMILTON BANK OF JOHNSON CITY,

vs.

CIVIL ACTION NO. 81-3567

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL

JUDGMENT OF PERMANENT INJUNCTION

Defendants' motion for judgment notwithstanding the verdict pursuant to FED.R.CIV.P. 50(b) is granted and judgment is hereby entered on behalf of defendants on the issue of whether plaintiff has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment. Judgment notwithstanding the verdict will be denied as to the verdict that defendants are estopped under state law from applying the present regulations rather than those applicable in 1973. In accordance with FED.R.C.P. 50(c) (1) the Court conditionally denies defendants' motion for a new trial on all issues should the judgment herein be vacated or reversed on appeal.

Upon reconsideration and further argument of the parties, the judgment of permanent injunction entered by the Court on May 6, 1982, is hereby ORDERED withdrawn and the following judgment of permanent injunction shall issue:

This cause came on to be heard on the 20th day of April, 1982, and on previous days before the Honorable John T. Nixon and a jury of lawful men and women who were sworn to try the issues joined and who were respited from day to day, and after the conclusion of all the proof, the argument of

counsel, and the charge of the Court, the jury did retire to consider their verdict. After due deliberation, the jury returned to open Court and announced that they had found that the plaintiff, Hamilton Bank of Johnson City, has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment and that the defendants should be estopped from requiring the plaintiff to comply with the present regulations as opposed to the 1973 regulations. The Court subsequently granted defendants' motion notwithstanding the verdict and entered judgment on their behalf on the issue of violation of the Just Compensation Clause of the Fifth Amendment.

IT IS THEREFORE, ORDERED that defendants, their officers, agents, representatives, employees, successors, and all persons acting on their behalf, be, and they are, hereby permanently enjoined and restrained from requiring plaintiff, its successors and assigns, to comply with any zoning ordinances, subdivision regulations, or other laws or regulations that may be applicable other than the zoning ordinances, subdivision regulations or other laws that may be applicable that were in force in Williamson County, Tennessee and applicable to Temple Hills Country Club Estates development in May 1973. A memorandum opinion will be issued subsequent to the entry of this ORDER.

Entered this 2nd day of June, 1982

John T. Nixon

UNITED STATES DISTRICT JUDGE

No. 84-4

Office-Supreme Court, U.S.

FILED

AUG 1 1984

ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, *Et Al.*,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Sixth Circuit

**BRIEF FOR RESPONDENT
HAMILTON BANK OF JOHNSON CITY
IN OPPOSITION TO PETITION**

G. T. NEBEL
BASS, BERRY & SIMS
2700 First American Center
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(615) 244-5370

Dated: August 1, 1984

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTIONS PRESENTED

Respondent denies that the "*Questions Presented*" are as stated by Petitioner. Rather, Respondent asserts that the single proper question presented is as follows:

Did the court of appeals correctly rule that the application of zoning regulations by the Defendant Planning Commission, which divested Plaintiff's property of any economically viable use, constituted a "taking" for which the Defendant must provide just compensation.

OTHER PARTIES NOT LISTED IN THE CAPTION

WILBURN H. KELLEY, JR.,
County Judge
MITCHEL BEARD,
Planning Commission Member
ROBERT MEDAUGH,
Planning Commission Member
JACK MEAGHER,
Planning Commission Member
JOE BAUGH,
Planning Commission Member
CAROLYN WATERS,
Planning Commission Member
KENNETH MCNEIL,
Planning Commission Member
CHARLES MOSLEY,
Planning Commission Member
MORTON STEIN,
County Planner
THAYER MARTIN,
County Engineer

Hamilton Bank of Johnson City became a wholly-owned subsidiary of Third National Corporation on December 1, 1982, and on September 20, 1983, formally changed its name to Hamilton Bank of Upper East Tennessee. Other subsidiaries of Third National Corporation are: Third National Bank of Nashville; American National Bank and Trust Company of Chattanooga; Third National Bank in Anderson County; Merchants Bank; The First National Bank of Lawrenceburg; The Union Bank; Third National Bank in Sevier County; Citizens Bank; Bank of Obion County; First National Bank of Rutherford County; Third National Mortgage Company; Third Lease Corporation; Third National Life Insurance Company.

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The following abbreviations are used in this brief: "Tr." (trial transcript); "Ex" (trial exhibit).

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-4

WILLIAMSON COUNTY
 REGIONAL PLANNING COMMISSION, *Et Al.*,
Petitioners,
 v.
 HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Petition For A Writ Of Certiorari To The United
 States Court Of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT
 HAMILTON BANK OF JOHNSON CITY
 IN OPPOSITION TO PETITION

Respondent, Hamilton Bank of Johnson City (hereinafter referred to as "Hamilton") respectfully submits that the Court should deny Williamson County Regional Planning Commission's (hereinafter referred to as "the Planning Commission") Petition for a Writ of Certiorari seeking review of a decision rendered by the Sixth Circuit. The Sixth Circuit decision reversed the district court's grant of a judgment notwithstanding the verdict in this Fifth Amendment case brought by Hamilton seeking compensation for the taking of its property.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Middle District of Tennessee are set forth in the Appendix to the Petition.

JURISDICTION

Hamilton does not question the jurisdiction of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and United States Code, Title 42, Section 1983 are correctly set forth in the Petition.

STATEMENT OF THE CASE

1. Factual Background

Hamilton is the owner of approximately 250 acres located in the Northern portion of Williamson County. (Ex. 9850, 9851). Prior to 1973, the property was owned by Willie Temple, who farmed the property. (Tr. 322). Several individuals were interested in developing the property for residential purposes and applied to the Williamson County Commission to have the Temple land rezoned from agricultural to residential cluster. (Tr. 322). In 1973, the Planning Commission changed its zoning ordinances to permit residential cluster development. (Tr. 322).

The Planning Commission originally approved the development plan for Temple Hills County Club Estates (hereinafter referred to as "Temple Hills") in 1973. (Ex. 01009, 01012, 01013, 01014). Between 1973 and 1979, the plan for the development of Temple Hills was reapproved

on a number of occasions under the original regulations that were in effect in 1973 at the time of the original approval, even though newer, tougher regulations had been enacted at various times between 1973 and 1979. (Ex. 9701, 9079, 01014, 01016, 0106A, 01022, 01032, 01056 and 01057; Tr. 1003, 142-51, 176-77). Between 1973 and 1979, the developer spent Three to Five Million Dollars on improvements to the property in reliance on the Planning Commission's approval. (Tr. 345, 115).

In 1979, for the first time, the Planning Commission attempted to change the rules of development in the middle of the game and retroactively applied new subdivision regulations and zoning ordinances to the Temple Hills project. (Ex. 9035, 01073; Tr. 149-51, 364).

The imposition of the regulations on the Temple Hills project made it impossible to complete. (Tr. 1721). The Planning Commission twice disapproved plans for development of the property under the new regulations. (Tr. 105-07). As a result, the property had no measurable economic value and Hamilton was accordingly divested of any economically viable use of the property. (Tr. 680-81, 716-17).

2. Proceedings Below

Hamilton brought this action against the Planning Commission in the United States District Court for the Middle District of Tennessee pursuant to the provisions of 42 U.S.C. § 1983 and § 1985. Hamilton contended that the actions of Defendants constituted a violation of its Federal Constitutional Rights under the Just Compensation Clause of the Fifth Amendment, and the equal protection and due process clauses under the Fourteenth Amendment. Hamilton also alleged various state court claims, including an allegation that Defendants were estopped from retroactively applying new subdivision

regulations and zoning ordinances to the Temple Hills project.

At the close of all of the evidence, the district court granted Defendants' motion for directed verdict on the substantive due process and equal protection claims. The case was then submitted to the jury on the remaining issues of procedural due process, taking without just compensation, and estoppel. In answer to special interrogatories, the jury found against Hamilton and in favor of Defendants on the issue of procedural due process. In addition, the jury returned a verdict that Hamilton had been denied economically viable use of its property in violation of the just compensation clause of the Fifth Amendment. The jury also found that Defendants were estopped under state law from requiring Hamilton to comply with the present zoning regulations as opposed to the 1973 zoning regulations. The jury assessed damages in the amount of \$350,000 for the temporary taking of Plaintiff's property.

The Defendants subsequently filed a motion for judgment notwithstanding the verdict. The court granted the motion in part and denied it in part. The court allowed the jury verdict of estoppel to stand and issued a judgment of permanent injunction enjoining Defendants from requiring Hamilton to comply with present regulations rather than the 1973 regulations. In granting the Defendants' motion for judgment notwithstanding the verdict in part, the court held that judgment on the taking issue would be inconsistent with the jury's finding that the Defendants were estopped from applying current regulations. As a result, the Plaintiff lost its jury verdict for damages in the amount of \$350,000.

Plaintiff then appealed the district court's judgment notwithstanding the verdict to the Sixth Circuit Court of

Appeals. The court of appeals reversed the judgment of the district court holding that there existed sufficient evidence that the Planning Commission had effected a temporary taking of Hamilton's property for which damages were correctly awarded. 729 F.2d 402 (6th Cir. 1984).

REASONS FOR DENIAL OF THE WRIT

1. No Conflict With Prior Decisions Of This Court.

This Court clearly established in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that governmental regulations affecting an owner's use of his property may constitute a taking. In *Pennsylvania Coal*, Justice Holmes maintained that "if regulation goes too far, it will be recognized as a taking." 260 U.S. at 415. Moreover, the taking clause was explicitly held applicable to zoning regulations in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), when this Court stated:

"The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188, 72 L. Ed. 842, 48 S. Ct. 447 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 36, 57 L. Ed.2d 631, 98 S. Ct. 2646 (1978)." 447 U.S. at 260.

This Court has also recognized that a taking need not be permanent, but that a temporary deprivation of property can constitute a taking for which damages are an appropriate remedy. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Accordingly, this Court's recent decision in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621

(1981), is in keeping with a long line of authority when it clearly indicates that a zoning regulation can effect a Fifth Amendment taking. The Petitioners argue that the court of appeals placed too much emphasis on the opinions of Justices Brennan and Rehnquist in *San Diego Gas*. But when one analyzes *Kimball* and the other cases cited by the court of appeals, it is clear that Justice Brennan's opinion is not the thin reed Petitioner argues it to be. The majority of this Court in *San Diego Gas* held the case nonjusticiable for lack of a final order. There is no evidence that they disagreed with the substantive law as stated by Justice Brennan. To the contrary, Justice Blackmun, the author of the majority opinion, himself acknowledged that the taking argument should not "be cast aside lightly." 450 U.S. at 633. This strongly indicates that Justice Blackmun saw at least some merit in the substantive contentions of *San Diego Gas*. Even more important is the fact that Justice Rehnquist, who filed a concurring opinion in the technical holding of the case, stated that he would agree "with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633-34. Combining Justice Rehnquist with the four dissenters alone would constitute a majority of this Court.

Moreover, the views expressed in Justice Brennan's opinion were a logical extension of earlier decisions of this Court. Justice Brennan was unequivocal that a city's exercise of its police power through promulgation of zoning regulations can constitute a "taking" within the meaning of the Fifth Amendment, citing a long line of decisions of this Court recognizing this principal. 450 U.S. at 647-48. Justice Brennan asserted that each decision had as its source the opinion of Justice Holmes in *Pennsylvania Coal* and noted that this entire court had implicitly recognized this principal in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), when it analyzed whether

the restrictions on the plaintiff's property imposed by a New York City ordinance effected a "taking" within the meaning of the Fifth Amendment. 450 U.S. at 648-49.

Furthermore, Justice Brennan's dissent was based on sound policy considerations. Part of that policy, as Justice Brennan observes in a footnote to his opinion, is that damages must be awarded for temporary taking through overregulation because injunctive or declaratory relief would "hardly" prevent the enactment of subsequent unconstitutional regulations by the government entity. 450 U.S. at 655 n. 22.

Finally, it is important to note that Justice Brennan's dissent in *San Diego Gas* has subsequently been cited with approval by Justice Powell on at least two occasions. See, *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981); *Parratt v. Taylor*, 451 U.S. 527 (1981).

Accordingly, the court of appeals correctly applied a long line of this Court's decisions in ruling that there was sufficient evidence upon which the jury could find that Hamilton had been denied any economically viable use of its property by the Planning Commission's application of its zoning ordinances.

2. No Conflict With Other Courts Of Appeals Decisions.

A number of Circuit Courts of Appeal have been quick to join the Sixth Circuit in embracing the view of Justice Brennan in *San Diego Gas*. For example, recent decisions of the Seventh Circuit have applied the reasoning adopted by the Sixth Circuit in the instant case. In *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981), tenants who had been evicted from substandard housing by a city sought compensation under state law and the Fifth and Fourteenth Amendments to the United States Constitu-

tion. Senior Circuit Judge for the Sixth Circuit John Peck, sitting by designation, examined the plaintiffs' claims and held that the eviction was a "taking" entitling the tenants to just compensation under the Fifth Amendment. In concluding that the district court had erred in finding that the housing code regulations did not constitute a regulatory taking, Judge Peck cited Justice Brennan's dissent in *San Diego Gas* for the proposition that public takings of private property may occur as the result of regulations which were intended only to promote public health, safety or morals. 665 F.2d at 142. Judge Peck also explicitly pointed out that Justice Brennan's dissent expressed the view of at least five members of this Court as to the merits of the case in *San Diego Gas*. *Id.* The Seventh Circuit reiterated this view in *Barbian v. Panagis*, 694 F.2d 476, 482 n. 5 (7th Cir. 1982), when it stated that the dissent in *San Diego Gas* "reflects the view of a majority of the Court."

Similarly, the courts in the Ninth Circuit adhere to the reasoning employed by the Sixth Circuit in the instant case. In *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.), *cert. denied*, 104 S. Ct. 151 (1983), plaintiffs, who had been precluded from developing their property by ordinances enacted by defendants, sought compensation under the Fifth Amendment. In reversing the district court's grant of summary judgment for defendants, the Ninth Circuit expressed the view that damages are an appropriate remedy for a temporary taking resulting from overregulation, noting that it agreed with the views expressed by "a majority of the Court" in *San Diego Gas*. 703 F.2d at 1148.

In addition, the Fifth Court adopted this same reasoning in *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *appeal dismissed*, 455 U.S. 901 (1982), *aff'd*

after remand, 699 F.2d 734 (1983). In *Hernandez*, the plaintiff was denied a zoning reclassification for his property when the city legislators realized that such a rezoning would increase the cost of obtaining a right-of-way easement across the plaintiff's land. Agreeing with the plaintiff's contention that the City's current zoning classification was unconstitutional, the court declared: "[I]t is well established that the application of a general zoning law to particular property will effect a 'taking' of that property under the just compensation clause of the Fifth Amendment if the ordinance denies the owner an economically viable use of his land." 643 F.2d at 1197. Accordingly, the court refused to grant the City immunity for damages resulting from the uncompensated taking. *Id.*

Petitioner's reliance on the Fifth Circuit opinion in *Frazier v. Lowndes County, Miss., Board of Education*, 710 F.2d 1097 (5th Cir. 1983), is misplaced. The court in *Frazier* did not address the issue of an appropriate remedy for a Fifth Amendment taking; it merely found that the plaintiffs' use of their property had not been deprived. *Frazier* involved an attempt by the defendant school board to increase the amount of rent to be paid by plaintiff lessees. In a brief discussion of the Fifth Amendment issue, the court ruled that the actions of the school board had not sufficiently deprived plaintiffs of their property interest to constitute a "taking." Thus, *Hernandez*, not *Frazier*, clearly reflects the Fifth Circuit's view that the awarding of damages is appropriate for a "taking" of property as a result of overregulation.

Finally, the First Circuit's opinion in *Citadel Corp. v. Puerto Rico Highway Authority*, 695 F.2d 31 (1st Cir. 1982), *cert. denied*, 104 S. Ct. 72 (1983), does not necessarily conflict with the Sixth Circuit's opinion in the in-

stant case. In *Citadel*, governmental agencies had "frozen" development on plaintiff's property while planning to ultimately condemn it in order to build a highway. In refusing to award damages, the court seemed to be most influenced by the fact that the offending governmental agency was a "state" within the meaning of the Eleventh Amendment and was thus immune from a claim for damages in a federal action. 695 F.2d at 34. In the instant case, the trial court determined that the Defendants were not cloaked with Eleventh Amendment immunity because they were neither the state nor agents of the state. (Order dated December 18, 1981, set forth in Appendix). The Defendants have not appealed from that order. Because *Citadel* involved an agency immune from damages under the Eleventh Amendment, the court's other statements regarding damages for temporary takings are merely dicta.

3. Respondent's Right To Develop The Property Was Properly And Thoroughly Considered Below.

Petitioner persists in asserting that Hamilton cannot claim an unconstitutional temporary taking under the Fifth Amendment because the developer never previously submitted nor had approved a plat that complied with either the 1973 zoning ordinance or the 1977 and 1979 amended zoning ordinances.

As the record clearly indicates and as the court of appeals noted, the plat submitted by the developer was approved and reapproved on a number of occasions between 1973 and 1979. Actually, the Petitioner's argument is that the developer never submitted a plat that was in compliance with the applicable zoning ordinances as interpreted by the post-1979 Planning Commission. The court of appeals correctly observed that "[t]he plat was apparently in compliance under one interpretation of the

zoning regulations, but not under an alternate interpretation." 729 F.2d at 403.

Furthermore, as pointed out by the court of appeals, this Court's opinion in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), does not require a contrary result. In *Agins*, the plaintiffs argued that the "enactment" of the zoning ordinances which restricted plaintiffs' use of their property constituted a "taking." The plaintiffs, however, never submitted a development plan requiring the ordinances to be applied to them. This Court concluded that for a taking to occur the plaintiffs in *Agins* would be required to submit a development plan. Hamilton, on the other hand, submitted a plan which was disapproved for reasons that imply a disapproval of any plan which would allow Hamilton to develop the property for an economically viable use.

Moreover, as stated by the court of appeals, the Petitioner's argument that the plat never complied with the applicable zoning ordinances is inconsistent with the jury's findings regarding the state law estoppel claim. Since there was material evidence from which the jury could find that the developer had received previous approvals by the Planning Commission and since the state law estoppel verdict by necessity means that the jury found that the developer had obtained prior approval, then the Petitioner's argument that the plat was never in compliance with the 1973 zoning ordinance must fail.

The Petitioner also contends that the court of appeals incorrectly upheld the sufficiency of the evidence that Hamilton's property retained no economically viable use after the Planning Commission's application of its ordinances. Petitioner's contention is unfounded, however, because the evidence overwhelmingly shows that Hamilton's property was rendered useless by the actions of the Planning Commission.

Whether property has been divested of any economically viable use is a factual inquiry. *Loreito v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-75 (1979). The jury clearly found that Hamilton's property retained no economically viable use as a result of the actions of the Planning Commission. Furthermore, even though the Petitioner never seriously argued on appeal that the property retained an economically viable use, the court of appeals found sufficient evidence to uphold the verdict of the jury. Accordingly, Petitioner's contentions present purely factual issues that have been addressed by the jury, reviewed by the court of appeals, and do not require review by this Court.

CONCLUSION

The decision of the court of appeals in the instant case properly follows decisions of this Court, and is wholly consistent with the purposes and goals of the Fifth Amendment. Thus, Respondent respectfully submits that there are no compelling reasons for this Court to grant the Petition for Writ of Certiorari, and that it, therefore, should be denied.

Respectfully submitted,

G. T. NEBEL

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*Attorney for Hamilton Bank
of Johnson City*

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

Case No. 81-3567

HAMILTON BANK OF JOHNSON CITY

vs.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, *et al*

RECEIVED FOR ENTRY

2:30 PM

Dec. 18, 1981

J. Murdic, Deputy Clerk

ORDER

The defendant's motion to dismiss came to be heard on December 14, 1981 and was denied for reasons stated on the record.

John T. Nixon

JOHN T. NIXON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 81-3567
JUDGE JOHN NIXON

HAMILTON BANK OF JOHNSON CITY,

Plaintiff

vs.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, *Et Al*,

Defendants.

**DEFENDANTS' MOTION TO DISMISS FOR
FAILURE TO STATE A CLAIM UPON WHICH
RELIEF CAN BE GRANTED**

Come the defendants and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure move for an Order dismissing the plaintiff's action on the grounds that it fails to state a claim upon which relief can be granted against the defendants.

In support of the Motion, the defendants would show that the plaintiff's Complaint alleges in Paragraph Two (2) that the Williamson County Regional Planning Commission was established pursuant to Tennessee Code Annotated § 13-3-101 and that the individual named defendants are either members of the Williamson County Regional Planning Commission or employees of and on the staff of the Williamson County Regional Planning Commission.

The plaintiff thus concedes in the sworn Complaint that the Williamson County Regional Planning Commission is a state agency created pursuant to Tennessee legislation. Defendants thus respectfully submit that the Complaint fails to state a claim against any of the defendants due to the fact that state

agencies along with their members and employees are granted immunity under the Eleventh Amendment of the Constitution of the United States.

In support of this Motion, the defendants rely upon the sworn Complaint filed by the plaintiff, the applicable law and the Memorandum attached in Support of said Motion.

Respectfully submitted,

STEWART, ESTES & DONNELL

By: Thomas M. Donnell, Jr.

THOMAS M. DONNELL, JR.

Robert L. Estes

M. Milton Sweeney

14th Fl, Third Nat'l Bank Bldg.

Nashville, TN 37219

615/244-6538

Attorneys for Defendants

CERTIFICATE

I certify that an exact copy of this Motion with supporting Memorandum was hand delivered to the offices of Frank C. Gorrell and G.T. Nebel, Attorneys for Plaintiff at BASS, BERRY & SIMS, 2700 First American Center, Nashville, Tennessee 37238 on this the 18th day of September, 1981.

Thomas M. Donnell, Jr.

THOMAS M. DONNELL, JR.

(8)
No. 84-4

Office - Supreme Court, U.S.
FILED
NOV 15 1984
ALEXANDER STEVAS.
CLERK

In THE
Supreme Court of the United States
OCTOBER TERM, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,
Petitioners,
v.
HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether a lower court's ruling on a Judgment Notwithstanding the Verdict should be overturned by a Court of Appeals when it is obvious that the majority in the split opinion has ignored facts upon which the lower court relied and has erroneously interpreted the facts as clearly contained in the transcript and appendix presented to that court.

2. Whether or not the Sixth Circuit Court of Appeals, by two-to-one split decision (Kennedy and Keith for the majority, Wellford dissenting) has misinterpreted the *San Diego Gas & Electric Co. v. City of San Diego* case, 450 U.S. 621 (1981) by inferring a holding which is not contained within that decision, so that a purported temporary interference with an investor's profit expectation constitutes an unconstitutional "temporary" taking under the Fifth Amendment of the United States Constitution such that money damages should be allowed. The majority's opinion is apparently based upon an implication contained in the *San Diego Gas* case as a result of a one-line remark contained in that opinion by Justice Rehnquist.

3. Whether, as here, a regional planning commission, which has been found to have acted in good faith, granting to a developer due process, both substantive and procedural, in the enforcement of validly enacted zoning ordinances and subdivision regulations, can be found to have violated a developer's Fifth Amendment rights by a temporary interference with profit-backed expectations, especially where such rights were supposedly obtained by submitting a preliminary plat for preliminary approval which on the face of the plat itself indicates the approval is limited in scope as to the total number of dwelling units approved preliminarily on that plat, and which plat violates both the *original* zoning ordinances and subdivision regulations in effect at the time the development of the subdivision began and the later amended zoning ordinances and subdivision regulations against which the Bank is complaining.

OTHER PETITIONERS NOT LISTED IN THE CAPTION

WILLBURN H. KELLEY, JR., County Judge
 MITCHEL BEARD, Planning Commission Member
 ROBERT MEDAUGH, Planning Commission Member
 JACK MEAGHER, Planning Commission Member
 JOE BAUGH, Planning Commission Member
 CAROLYN WATERS, Planning Commission Member
 KENNETH MCNEIL, Planning Commission Member
 CHARLES MOSLEY, Planning Commission Member
 MORTON STEIN, County Planner
 THAYER MARTIN, County Engineer

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B. That the contrary decision of the Court of Appeals below conflicts with the prior rulings of this Court and numerous other Courts of Appeals, so that it is now unclear as to the rights of developers regard- ing the function of regional planning commissions across the country. This uncertainty in the law has the potential of subjecting regional planning com- missions to billions of dollars in damages hereto- fore not thought to be available to developers as a result of the legitimate exercise of authority by such planning commissions. To allow the decision of the Court of Appeals for the Sixth Circuit to	

stand in this case will have such an absolute chilling effect as to make orderly and necessary planning of communities totally chaotic to the extent that there may be no more control for orderly growth, or protection of the property rights of the citizens who have relied upon valid zoning ordinances and subdivision regulations and their vigorous enforcement..... 19

C. That the issue of damages appropriate in a Fifth Amendment Taking has never been ruled upon by this Court, although in several prior decisions this Court has earnestly expressed a desire to resolve the question. 19

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-4

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, entered on March 7, 1984, is reported at 729 F. 2d 402. A copy of that opinion is reproduced in the Joint Appendix at 44 through 66. The Order and Memorandum of the District Court granting the Judgment Notwithstanding the Verdict is not reported. However, it is reproduced in the Joint Appendix at 36 through 42.

JURISDICTION

The opinion of the Court of Appeals was rendered on March 7, 1984. Thereafter, a timely petition for panel rehearing and suggestion for rehearing en banc was denied on April 20, 1984, (J.A.81). By order dated May 3, 1984, the court below stayed its mandate until July 2, 1984. Petition for certiorari was filed on July 2, 1984, within 90 days of entry of the order denying the petition for rehearing. The Petition was granted on October 1, 1984. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner, Williamson County Regional Planning Commission (hereinafter the "Commission") is a state regional planning commission with authority over all the unincorporated portions of Williamson County, Tennessee, which adjoins Metropolitan Nashville, Davidson County, Tennessee. The respondent, Hamilton Bank of Johnson City (hereinafter the "Bank") in November 1980 acquired ownership of a portion of the Temple Hills Development which had not yet been developed. The Bank acquired the remaining undeveloped portion as a result of foreclosing upon its borrower who was the prior developer (R. 71, 81, 88).

The Bank sued the Commission because the Commission turned down a preliminary plat submitted by the Bank in June 1981.

The Temple Hills Development was begun shortly after a new zoning ordinance was enacted by the Williamson County Commission (the County Court, not the Petitioner herein) in 1972. At that time, a developer seeking approval of a development was required to come before the Commission for the preliminary approval of what was called an "initial sketch plan". The initial sketch plan, as the title connotes, was a very limited plan in that it required very little, if any, engineering data that might ultimately be required for approval of either a final plat of either an individual section of the development, or of the development as a whole, or a building permit. The purpose of the initial sketch plan was to allow the Commission, the county planner, and the developer to review the proposed development to determine whether it *generally appeared to be in conformance with the zoning ordinances and subdivision regulations* (R. 49, J.A. 82; R. 54, J.A. 82; Def.Ex. 108, R. 417, 418). In other words, the procedure consisted of two basic steps. The first step, the preliminary plat, was a mere general diagram of the layout of the proposed development. The preliminary sketch plat did not include any engineering data by which the slope of the property or road grades could be determined and did not contain other information which would be necessary before a final plat could be approved. The preliminary sketch plat is not required to be nor was it recorded in this case. The second step required

the submission to the Commission of a final plat which would contain significant engineering data, would be authenticated by the Secretary of the Commission and would be recorded in the Register's office of Williamson County, Tennessee (Def.Ex. 108, R. 417, 418). In order to be approved by the Commission, the final plat had to conform to and be in conformance with all requirements of the Williamson County zoning ordinances and subdivision regulations (Def.Ex. 108, R. 417, 418).

The original developer of the property in question sought and obtained initial sketch plan approval from the Planning Commission on February 1, 1973 for the Temple Hills Country Club Estates (Pl.Ex. 9700, J.A.422, R. 48, 156). The original total project as represented on that preliminary sketch plan indicated that there were 676 acres in the proposed development. Of that 676 acres, 287 acres were designated for dwelling unit lots, while 129 acres were designated for *future* development. In addition, the initial preliminary sketch plan showed actual dwelling units presented in *this* sketch plan as 469, and as allowable dwelling units for future development, 267 units. In addition to those figures, the initial sketch plan upon which the respondent now claims vested rights, contained large areas designated for future development as follows:

**"THIS PARCEL NOT TO BE DEVELOPED UNTIL
APPROVED BY THE PLANNING COMMISSION."**

Also, Note No. 9 on the plan provided as follows:

**"PARCELS WITH NOTE 'THIS PARCEL NOT TO
BE DEVELOPED UNTIL APPROVED BY THE
PLANNING COMMISSION' NOT A PART OF THIS
PLAT AND NOT INCLUDED IN GROSS AREAS."**

This preliminary or initial sketch plan with these notes thereon was revised and reapproved in May 1973, June 1974, April 1978, and April 1979 (Pl.Ex. 9701, J.A.423, R. 223, 226). No further action was taken on the total plan encompassed in the foregoing initial sketch plans, although certain individual sections within those portions of the total plan which had received initial approval did receive final approval in 1974 and 1975 (the latter final approval of Sections I, II and III reflected on Pl.Ex. 9701, J.A.423, R. 223, 226). At no time during the

reapproval process of the initial preliminary sketch plan were the notes referred to above ever deleted or changed, and no approval was sought nor obtained for development of the areas marked for future development.

It was not until 1980 that the prior developer to the Bank first submitted a preliminary sketch plan which proposed to develop those areas that had previously been excluded from approval and so marked on all preliminary plats approved since 1973 (R. 1103, 1108, J.A. 208; Def.Ex. 103, R. 1120). Unlike the preliminary plat approved in 1973 and reapproved several times thereafter, the preliminary sketch plat first submitted by the Bank's predecessor developer in 1980 contained cul-de-sacs in excess of the allowable limits set forth in the subdivision regulations in effect in both 1973 and in later amended regulations (R. 1108, J.A. 208; Def.Ex. 111, 112, R. 1184, 1188). Further, this preliminary plat, taken together with the topographical maps that were submitted to the Commission in 1979-1980 for the first time (Pl.Ex. 9705, R. 182, 188), indicated road grades clearly in excess of that allowed by the subdivision regulations, both in 1973 and later as amended (Def.Ex. 110, 111, R. 1065, 1184, 1188).

Further, the 1980 preliminary plat, taken together with the topographical map, clearly indicated that there were approximately 88 acres within the development that approval was first being sought that lie on slopes in excess of 25% (Pl.Ex. 9705, R. 182, 188; Pl.Ex.1087, J.A.285, R. 173, 199).

Additionally, another significant change contained on the 1980 preliminary plat was the fact that the boundary lines of the development had changed in that 18½ acres of the original development had been condemned by the State of Tennessee in the development of the Natchez Trace Parkway, for which the developer was properly compensated by the State (R. 132, J.A.90; R. 262, J.A.109; R. 1106, J.A.207; R. 1108, J.A.208; R.1127, J.A.210; R. 1133, J.A.211; R. 1704-1706, J.A.222; Pl.Ex. 9705, R. 182, 188).

The 1980 preliminary sketch plat thus revealed numerous violations of both the 1973 zoning ordinances and subdivision regulations as well as those as amended from time to time thereafter (Pl.Ex. 1087, J.A.285, R. 173, 199; Def.Ex. 108, R.

417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184; Def.Ex. 110, R. 1065; Def.Ex. 111, R. 1184, 1188; Def.Ex. 112, R. 1184, 1188). For instance, the zoning ordinances in effect in 1973, which were the first to allow cluster development in the county, as well as those amended from time to time through 1981, required that all areas contained within such development that had a slope greater than 25% be deducted from the gross acreage in determining the total density of the entire development.

Up until the 1980 plat was submitted by the respondent's predecessor developer, none of the preliminary sketch plats that were submitted to the Commission, or approved by the Commission, and none of the final plats for certain limited sections of the subdivision, contained any request for approval of more than 469 dwelling units in the development. The 1980 plat was the first plat that sought approval for any number greater than that (R. 262, J.A.109; R. 1106, J.A.207; R. 1108, J.A.208; R. 1127, J.A.210; R. 1133, J.A.211; R. 1704-1706, J.A.222).

Until the 1980 plat was submitted, no plat had been submitted to the Commission asking for or obtaining approval of those areas of the development that had been marked on the original preliminary sketch plat as "THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION," and "PARCELS WITH NOTE 'THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION' NOT A PART OF THIS PLAT AND NOT INCLUDED IN GROSS AREAS."

With all the foregoing plats, information and the disapproval by the Commission of the 1980 plat being known to the respondent Bank, the Bank foreclosed on the prior developer in November 1980. Shortly thereafter in June 1981, the respondent Bank submitted a preliminary sketch plat which was essentially identical to the 1980 plat and which contained all the foregoing errors and new information and materials which had been submitted to the Commission for the first time in 1980 and disapproved (Pl.Ex. 9702, J.A.424, R. 233, 234; R. 1151-1152; R. 1180-1182).

Although the Complaint of the Bank complains that the newer amended zoning ordinances and subdivision regulations

enacted in 1977 were the reasons its plat was turned down by the Commission, both the plat that the respondent Bank submitted in June 1981, as well as the plat that its predecessor developer submitted in 1980, not only violated the newer zoning ordinances and subdivision regulations, but clearly and unequivocally violated the older 1973 zoning ordinances and subdivision regulations which were in effect at the time this development was first sought to be developed (Def.Ex. 108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184; Def.Ex. 110, R. 1065; Def.Ex. 111, R. 1184, 1188; R. 169; Pl.Ex. 9702, J.A.424, R. 233, 234).

The Bank now takes the position that simply because the original preliminary sketch plat showed 677 acres, approval of 469 dwelling units and merely a potential for development of 736 units, it is entitled to develop 736 units. This total is based strictly upon a mathematical calculation on the density formula provided in the original zoning ordinance in 1973. This calculation does not take into consideration the portion of the property required by the ordinance to be deducted from the gross area, or the fact that a portion of the property no longer belongs to the development, i.e., that portion having been condemned by the State. The Bank also totally ignores the fact that the original preliminary sketch plan clearly states on the face of it that certain parcels were not to be developed until subsequent approval was obtained from the Planning Commission, as well as the fact that the actual number of dwelling units approved on that plat was only 469 (Pl.Ex. 9700, J.A.422, R. 48, 156).

Immediately after the initial rejection of its preliminary plat in 1981, the Bank made no genuine attempt whatsoever to correct the deficiencies pointed out to it. Instead, the Bank proceeded to insist that the plat be approved by the Commission in that form and spent most of its time, energy and resources hiring engineers to testify at trial that, because of the eight reasons given by the Commission for turning it down, it was now economically impossible to develop the plat. The Bank never attempted to present a proposal to the Planning Commission of any viable alternative which could meet any of the zoning ordinances and subdivision regulations enacted in 1973, by which

it contended this respondent must comply. The Bank simply filed suit and alleged damages from the people of Williamson County, Tennessee by alleging and arguing that the amended zoning ordinances and subdivision regulations, not the original ordinances and subdivision regulations in effect when the subdivision was begun in 1973, were the factors preventing approval of the plat it submitted in 1981. The Bank filed suit in August 1981. It was only after the trial, and in attempt to settle the question as to the estoppel issue, that the Bank made any attempt to redesign its proposed plan. When the plan was redesigned substantially in accordance with the manner in which the county engineer testified at the trial, the Commission, on March 10, 1983, approved a new preliminary sketch plan (A. to Brief).

During the trial, Thayer Martin, the county engineer, testified that he could redesign and in fact did redesign the layout of the road to show that it could be developed within the zoning ordinances and subdivision regulations in effect not only in 1973, but in effect in 1981, so that the total development could contain approximately 558 dwelling units (R. 1570, J.A.220). The opinion of the U.S. Court of Appeals for the Sixth Circuit totally disregarded this qualified expert's testimony (J.A.44-66).

Although the zoning ordinances in effect in 1973, as well as those later in effect in 1981, required a certain minimum amount of "open space" within its development (Def.Ex. 108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184), which "open space" was to be held primarily for the use and benefit of the residents of the cluster development (Def.Ex. 108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184; R. 341, J.A.139; R. 378, J.A.142; R. 602, J.A.153), the "open space" has been developed by prior developers of the respondent and thereafter sold to entities or individuals other than those permitted by the zoning ordinances and without approval of the Commission as required by the zoning ordinances (Def.Ex. 105, J.A.392, R. 1144, 1145; Def.Ex. 108, R. 417, 418; Def.Ex. 127, R. 1879, 1884). Both the 1973 and 1981 zoning ordinances required that the "open space" be held primarily for the benefit of the residents of the entire development; however, prior developers of the property placed restrictive covenants and amendments thereto

which were not approved by the Commission or the Homeowners' Association, effectively excluding residents of the development from using the "open space" unless and until they became members of a private country club (Def.Ex. 105, J.A.392, R. 1144, 1145; Def.Ex. 124, R. 426, 427; Def.Ex. 125, R. 1872, 1884; Def.Ex. 126, R. 1188, 1189; Def.Ex. 127, R. 1879, 1884; R. 1874-1887, J.A.225; R. 1889, J.A.236). Thus, approximately 260 acres of this development has been developed as a private country club and golf course for the benefit of the developers. Additionally, 212 dwelling units had already been approved by the Commission for the prior developers to develop before the respondent Bank foreclosed and purchased the property now in dispute and submitted its preliminary sketch plat of June 1981, upon the disapproval of which this lawsuit was filed. That portion of the property on which the 212 dwelling units were given both preliminary and final approval by the Commission, and which property has been substantially developed fully, is not a part of the property foreclosed on and purchased by the Bank and is not a part of this lawsuit.

Although the respondent Bank is alleging that it had spent large amounts of money on this development for both on-site and off-site improvements for the "total development" (R. 80, J.A.83; R. 265, J.A.110), Tom Kenny of the Harpeth Valley Water District, which served the development, who was a witness for the respondent Bank, testified on cross-examination that the same off-site improvements would have had to have been provided for a development of 400-500 homes, which the Commission has indicated it would clearly approve (R. 892, J.A.197; R. 1570, J.A.220). Furthermore, in the area now sought to be developed by the respondent Bank, there have been no on-site improvements whatsoever by either the respondent Bank or its prior developers, as all on-site improvements made on the development have been for the previous 212 dwelling units on which the Commission has given final approval as well as for the golf course and country club which have been developed and sold (R. 365).

SUMMARY OF ARGUMENT

The majority of the United States Court of Appeals for the Sixth Circuit has erroneously determined, after review on appeal, that the trial court's granting of the Judgment Notwithstanding the Verdict should be overturned because there was sufficient evidence to support a finding of a "taking". Not only did the majority for the Court of Appeals incorrectly interpret the evidence before it, it also erroneously found that the dissenting opinion from *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) is controlling law.

It is the position of the Petitioner that the dissent in the *San Diego Gas* case cannot be interpreted to be the law regarding unconstitutional takings under the Fifth Amendment of the U.S. Constitution. To do so requires a finding by the Court of Appeals that would overturn all prior decisions of the United States Supreme Court regarding that question. *Mugler v. Kansas*, 23 U.S. 623 (1887); *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) and *Agins v. City of Tiburon*, 447 U.S. 255 (1980). Even if the Supreme Court should now decide that all of these prior decisions should be overturned and the dissent set forth in the *San Diego Gas* case become law there cannot be found to have been a taking in this case even under the *San Diego Gas* rationale.

In order for there to be a taking there must first be established some right on behalf of the Complainant which is susceptible of protection under the Fifth Amendment. The preliminary plat sought to be approved by the Bank in June 1981 and upon which its entire lawsuit is based contained violations of the ordinances and regulations in effect at that time, as well as those in effect in 1973, with which the Bank, at minimum, must comply.

In the instant case the Bank which acquired a portion of an ongoing development through foreclosure has not acquired such cognizable vested rights that have been taken. At the time the Bank acquired a portion of the development, it was aware that the subdivision regulations and zoning ordinances which affected the property had been amended and upgraded and, in fact, had been applied to the development. It was also aware

that continued development, substantially as the Bank contemplated, had been disapproved by the Commission in October 1980 prior to the time it purchased the property.

The Bank also claims that it has certain vested rights as a result of action taken by the Planning Commission at the time the development was initially approved in 1973. This argument is incredulous in light of the fact that the initial approval in 1973 explicitly withheld approval of development of certain areas of the property within the subdivision. These areas that were purposely not given approval at the original time, now constitute part of the property sought to be developed by the Bank. It can have no rights under the prior approval upon which it now claims to rely for areas that were *not* approved.

Having failed to establish any cognizable rights, the Bank cannot be allowed to sustain an action for violation of rights which it does not possess.

Further, even under the doctrine set forth in the dissent of *San Diego Gas* there cannot be a finding in this case that the Bank was denied economically viable use of the property. The Court of Appeals fails to consider the fact that the development must be considered as a whole. Small portions thereof for which the Bank now seeks approval cannot be segregated out when attempting to answer the question of whether or not the Bank and its prior developers had been denied any economically viable use of the property. This Court was explicit in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) when it stated "taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." The developers of this subdivision, prior and the present Bank, have had 212 dwelling units and a 27 hole private golf course approved and almost totally built.

It is time for the Court to recognize the fact that the reason there is so much confusion in the area of taking and land use development is that the Court should not consider whether or not there has been a compensable taking under the Fifth Amendment, but whether there has been a violation of due process, either substantive or procedural¹. It is submitted that while the Court may have spoken in terms of property rights

being taken, in actuality all of the tests set forth in the cases through the years have been based upon violation of due process. *Mugler v. Kansas*, 123 U.S. 623 (1887) and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). All of the tests set forth in those prior decisions while couched in terms of property rights really speak in terms of violation of due process. In the instant case, the verdict from the District Court was that the Bank had been afforded all due process to which it was entitled, both procedural and substantive, and that finding was not disturbed by the U.S. Court of Appeals for the Sixth Circuit. The U.S. Court of Appeals for the Sixth Circuit must be reversed, as to the taking issue.

ARGUMENT

A. THAT THE MAJORITY OF THE COURT OF APPEALS ERRONEOUSLY INTERPRETED THE EVIDENCE PRESENTED TO IT AND ERRONEOUSLY INTERPRETED THE IMPLICIT HOLDING OF THE SAN DIEGO GAS CASE.

In the opinion of the U.S. Court of Appeals for the Sixth Circuit, both the majority and dissenting judges agree that at the time they rendered that opinion, the Supreme Court had not set a clear standard as to what conduct amounts to a "taking" under the Fifth Amendment. The majority, by interpreting what it finds to be the implicit holding of *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), relies upon a statement made by Justice Rehnquist in a concurring opinion, referring to the dissent in that case. Justice Rehnquist's statement, "I would have little difficulty in agreeing with much of what was said in the dissenting opinion of Justice Brennan . . ." does not necessarily provide the strong support of Justice Brennan's dissent upon which the majority of the Court of Appeals attempts to rely. Judge Wellford, in his dissent, clearly indicates that Justice Rehnquist would decide with the majority as a result of his opinion in *Loretto v. Teleprompter of Manhattan, CATV Corp.*, 458 U.S. 419 (1982). The majority opinion of the Court of Appeals obviously disregards substantial evidence in the case, or perhaps it failed to review certain exhibits (the various plats

submitted to the Commission from time to time) that were before the Court, that would clearly indicate that the District Judge's granting of the Judgment Notwithstanding the Verdict was entirely proper. The U.S. Court of Appeals for the Sixth Circuit supported the type of action taken by the District Court in this case in its holding in the case of *O'Neill v. Kiledjian*, 511 F.2d 511, 513 (6th Cir. 1975). The majority ignores the District Court's narrow focusing on the issue of whether there had been a violation of the Fifth Amendment. When viewing the evidence even in the light most favorable to the Bank, it is clear that the Bank's failure to present a preliminary plat that at least met the standards in effect in 1973, prohibits the Bank as a matter of law from obtaining a judgment in its favor for a violation of the Fifth Amendment. Judge Wellford correctly views the action of the lower court's holding and states in his dissent as follows:

Even if the jury verdict in this case did establish a temporary deprivation and a denial of economically viable use of part of the property, as apparently the District Judge concluded that it did, I would agree with his ultimate holding that "the temporary interference with the plaintiff's development backed expectations and any temporary diminution in value of the property, whether styled as 'temporary taking' or otherwise . . ." is essentially a question of law.

He concluded that under the circumstances plaintiff was not entitled to damages as a matter of law since it could proceed under 1973 zoning regulations by reason of estoppel. Judge Wellford properly views the evidence submitted to the Court of Appeals as follows:

Properly considered, there was questionable evidence in this case, at best, that all economically viable uses of the property had been even temporarily taken, or that reasonable "investment-backed expectations" had been arbitrarily eliminated.

The majority opinion erroneously assumes that the jury's finding on the estoppel claim, which was merely that the Planning Commission was estopped to apply the amended 1979 standards, amounted to a finding that the Bank had acquired

the right to develop the Temple Hills property according to the plats that had been submitted. This was not the finding as to estoppel. The estoppel issue was whether the Planning Commission had the right to amend its ordinances and regulations and apply those amended ordinances and regulations after the development had begun.

The issue that should have been submitted by the District Court Judge to the jury, as requested by the Planning Commission in both its requests for special interrogatories and instructions to the jury, was whether the Bank had submitted a plat to the Planning Commission that complied with any ordinances or regulations, particularly those in effect in 1973. The District Court refused to submit the issue stated in that fashion to the jury, but corrected that error when it granted the Planning Commission's motion for Judgment Notwithstanding the Verdict by finding that as a matter of law the Bank had not submitted to the jury an issue of fact regarding the unlawful temporary taking under the Fifth Amendment. Thus, the District Court reached the right decision, although it is conceded it may have given the wrong reason for that decision in its Memorandum Opinion.

The majority of the Court of Appeals opinion erroneously concludes that "the District Court 'apparently concluded' as a matter of law," that without the application of the zoning regulations in a manner impermissible under state law, as evidenced by the estoppel verdict, there could not be a "taking". Actually the District Court did not find an impermissible application of zoning ordinances and regulations, but merely found that the otherwise valid 1977 amended ordinances and regulations did not themselves apply to this subdivision and that the earlier 1973 ordinances and regulations did apply. Therefore, the District Court did not find that the Planning Commission was impermissibly applying the 1977 regulations or the 1973 regulations, but merely found that they were applying the wrong regulations. Even if the Planning Commission had applied the 1973 regulations, the plat that the Bank submitted, which was disapproved and on which this lawsuit arose, did not comply with those 1973 regulations, and, therefore, the Bank presented no issue of fact triable to the jury regarding an impermissible taking under the Fifth Amendment. The fact that

the majority concludes in its opinion that the jury, which awarded the Bank \$350,000 in damages, was correctly instructed on the question of damages under the theory of a temporary taking, ignores the fact that the jury's verdict was invalid because the Planning Commission was entitled to judgment as a matter of law since the Bank had never submitted a plat that was capable of approval under either the 1973 or 1977 ordinances and regulations.

It must be emphasized that June 1981 was the first time a preliminary plat was submitted by the Bank to the Planning Commission. This was the first time that numerous building sites, roads and other improvements were shown in areas that had been specifically designated in the original 1973 plat as "not part of the development" and "not to be developed until approval" was later obtained from the Planning Commission. The majority seems to be extraordinarily swayed by a letter presented at trial signed by six members of the 1973 Planning Commission stating that 736 units had been approved for that development. These members, having been persuaded by representatives of the Bank to sign that letter, ignored statements on the face of the 1973 plat that "this parcel not to be developed until approved by the Planning Commission" and "parcels with this note 'this parcel not to be developed until approved by the Planning Commission' not part of this plat and not included in gross area." Perhaps the most damning to the plaintiff's position and to the erroneous holding by the majority of all evidence contained on that plat is the statement "actual dwelling units presented this initial sketch plan, 469."

Additionally, the zoning ordinances in effect in 1973, which were the first to allow cluster development in the county, as well as those in effect in 1981, required that all areas contained within a development that had a slope greater than 25% be deducted from the gross acreage in determining the total density of the entire development. Neither the Bank nor its predecessors had ever taken into account the fact that there were approximately 88 acres within this development that lie on a slope in excess of 25% (Pl. Ex. 1087, J.A.285, R. 173, 199; Pl. Ex. 9705, R. 182, 188). Thayer Martin, the county engineer, testified that in fact there were areas contained within the development now sought to be developed by the Bank that had slopes in

excess of 25% (R. 1386, J.A.219). This testimony was confirmed by experts provided by the respondent Bank, Messrs. Sid Smith and Leon Stanford (R. 656-658, J.A.156; R. 1009, J.A.201). This information was first available to the Commission in late 1979 or early 1980 when the prior developer submitted to the Commission a topographical map which contained two-foot contours allowing the determination of slope (R. 132, J.A.90; R. 1386, J.A.219; Pl.Ex.9705, R. 182, 188; Def.Ex.273, R. 1409, 1425).

The Bank's own expert witnesses, Messrs. Leon Stanford and Sid Smith, both agreed that Mr. Martin's method of calculating slope was in fact correct (R. 656-658, J.A.156; R. 1009, J.A.201). Additionally, the Bank's witness, Ms. Gail Moyer, who was on the Board of Zoning Appeals for Williamson County, also testified that if there was land within the Temple Hills Development that had slope in excess of 25%, such land should have been excluded from the development and any ruling of the Board of Zoning Appeals to the contrary was in fact incorrect (R.742-746, J.A.176; Pl.Ex.2524, J.A.310, R. 179, 199).

Unlike the preliminary sketch plat approved in 1973 and reapproved a few times thereafter, the preliminary sketch plat submitted by the prior developer in 1980 and by the respondent Bank in June 1981 contained cul-de-sacs in excess of the allowable limits set forth in the subdivision regulations in effect in both 1973 and in 1981 (Pl.Ex.9702, J.A.424, R. 233, 234; Def.Ex.111, 112, R. 1184, 1188). A viewing of these preliminary plats (Pl.Ex.9700, J.A.422, R. 48, 156; Pl.Ex.9702, J.A.424, R. 233, 234) indicates even to the untrained eye a definite change in the layout of the road system. This was the *first* time such cul-de-sacs of such great length had been presented by the Bank to the Planning Commission for approval. Further, the first time any plat with such cul-de-sacs had ever been submitted to the Planning Commission was in late 1980 by the prior developer, which plat had also been disapproved, and such disapproval was known to the respondent Bank prior to its foreclosure and purchase of the property (R.1108, J.A.208; R. 1125, J.A.209; Def.Ex.66, J.A.237, R. 1068; Def.Ex.103, R. 1120). In reviewing the preliminary plats submitted by the Bank (Pl.Ex.9702, J.A.424, R. 233, 234), together with the topograph-

ical maps that were submitted to the Planning Commission by the predecessor of the Bank (Pl.Ex.9705, R. 182, 188), it is clear that the road grade in many areas sought to be developed by the Bank would be in excess of that allowed by the 1973 subdivision regulations, which the Bank claimed are applicable to their plat, as well as in excess of that allowed by the 1981 regulations (Def.Ex.110, R. 1065; Def.Ex.111, R. 1184, 1188).

During the trial, Thayer Martin, the county engineer, testified that he could redesign and in fact did redesign the layout of the road in certain areas sought to be developed by the Bank to show that it could be developed within the zoning ordinances and subdivision regulations in effect in the county both in 1973 and 1981 so that the total development could contain approximately 558 dwelling units (R. 1570, J.A.220). The majority opinion of the U.S. Court of Appeals for the Sixth Circuit totally disregarded the testimony of Mr. Martin, a qualified expert, preferring instead purported expert testimony provided by a property *appraiser*, who testified on behalf of the Bank. This appraiser's testimony was obviously based on questionable information provided to him by Tom Ragsdale, the planner who worked for the Bank in regard to this development (Pl.Ex.9850, J.A.374, R. 671).

Both the preliminary sketch plats submitted by the Bank in 1981 as well as the plat submitted by the Bank's predecessor developer in 1980, both of which were disapproved, showed that certain land in the proposed area yet to be developed had slope in excess of 25%. A significant portion of such property had been sold to a third party and was at that time being used as a golf course. The zoning ordinances in effect in 1973 as well as in 1980-1981 all required that this land be included in "open space" and set aside within the development for the exclusive use of the homeowners therein (Def.Ex.108, R. 417, 418; Def.Ex.109, J.A.415, R. 1182, 1184; R. 1173, J.A.216). The ordinances in effect at all times pertinent hereto required that all such land not only be included in "open space", but that it be declared non-buildable land (Def.Ex.108, R. 417, 418; Def.Ex. 109, J.A.415, R. 1182, 1184).

The Bank and its predecessors have charged that the Planning Commission "changed the rules in the middle of the

game" (Complaint, J.A.5). The only change of significance which adversely affected the development of the Temple Hills property was the change that the Bank itself tried to effect by means of its 1981 preliminary plat, which differs greatly from the 1973 plat, both in terms of those areas specifically designated as originally approved as well as those areas specifically designated as not being approved in 1973 and in reapprovals of that 1973 original sketch plat (Pl.Ex.9700, J.A.422, R. 48, 156; Pl.Ex.9702, J.A.424, R. 233, 234). Since the evidence was clear that the plat submitted in 1981 by the Bank could not even comply with the zoning ordinances and subdivision regulations in effect in 1973 under which the Bank sought approval, then it is not the Planning Commission that "changed the rules in the middle of the game", but the Bank, as a new developer, which itself changed its preliminary plat in the middle of the game (Pl.Ex.9700, J.A.422, R. 48, 156; Pl.Ex.9702, J.A.424, R. 233, 234).

Perhaps the most significant fact overlooked by the U.S. Court of Appeals for the Sixth Circuit and totally ignored by the Bank is that the entire development, not just the portion foreclosed by the Bank for which approval is now sought for development, must be considered in applying an economically viable use standard. The development had approximately 212 dwelling units approved and partially if not almost totally completed prior to the Bank's foreclosure and purchase of this property and submittal of its plat in June 1981 for approval, the golf course approved, built and in place, and the Bank under its interpretation would be allowed at least an additional 67 dwelling units, for a total of 289 dwelling units in addition to the golf course. If the Bank had revised its June 1981 preliminary sketch plat, it would have been able to obtain approval of an additional 346 units by merely correcting the road layout, removing certain areas from the development which contained areas of slope in excess of 25% and eliminating excessive road grades (R.1570, J.A.220). However, the Bank chose not to do so until after the trial of this matter.

It is submitted that the majority writing the opinion for the U.S. Court of Appeals for the Sixth Circuit so erroneously interpreted the evidence that it failed to meet the threshold standard of determining whether there were any rights that the plaintiff

acquired by submitting a plat in 1981 that did not comply with any regulations. Such a plat could not possibly create rights capable of violation, and thus capable of constituting an unconstitutional "taking".

B. THAT THE CONTRARY DECISION OF THE COURT OF APPEALS BELOW CONFLICTS WITH THE PRIOR RULINGS OF THIS COURT AND NUMEROUS OTHER COURTS OF APPEALS, SO THAT IT IS NOW UNCLEAR AS TO THE RIGHTS OF DEVELOPERS REGARDING THE FUNCTION OF REGIONAL PLANNING COMMISSIONS ACROSS THE COUNTRY. THIS UNCERTAINTY IN THE LAW HAS THE POTENTIAL OF SUBJECTING REGIONAL PLANNING COMMISSIONS TO BILLIONS OF DOLLARS IN DAMAGES HERETOFORE NOT THOUGHT TO BE AVAILABLE TO DEVELOPERS AS A RESULT OF THE LEGITIMATE EXERCISE OF AUTHORITY BY SUCH PLANNING COMMISSIONS. TO ALLOW THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT TO STAND IN THIS CASE WILL HAVE SUCH AN ABSOLUTE CHILLING EFFECT UPON PLANNING AS TO MAKE ORDERLY AND NECESSARY PLANNING OF COMMUNITIES TOTALLY CHAOTIC TO THE EXTENT THAT THERE MAY BE NO MORE CONTROL FOR ORDERLY GROWTH, OR PROTECTION OF THE PROPERTY RIGHTS OF THE CITIZENS WHO HAVE RELIED UPON VALID ZONING ORDINANCES AND SUBDIVISION REGULATIONS AND THEIR VIGOROUS ENFORCEMENT.

C. THAT THE ISSUE OF DAMAGES APPROPRIATE IN A FIFTH AMENDMENT TAKING HAS NEVER BEEN RULED UPON BY THIS COURT, ALTHOUGH IN SEVERAL PRIOR DECISIONS THIS COURT HAS EARNESTLY EXPRESSED A DESIRE TO RESOLVE THE QUESTION.

The issues presented above will be argued together because they are so closely related in law and fact. A unified discussion will avoid unnecessary repetition.

Although the United States Supreme Court has never explicitly held that subdivision regulations and zoning ordinances which deprive an owner of reasonable beneficial use of his property constitute a "taking" of that property under the U.S. Constitution, other courts have found that restrictions may constitute a "temporary taking" of property if the restriction precludes all reasonable use, or if the restriction has "gone too far" or if it is unduly oppressive. The remedy in each case has been to invalidate the ordinance or regulation, not impose damages. This is, of course, not to imply that in this case there has been any deprivation of any rights of the Bank cognizable under the Fifth or Fourteenth Amendments of the Constitution, or under 42 U.S.C. § 1983.

It is asserted that the decision in *Agins v. City of Tiburon*, 598 P.2d 25 (1979), affirmed at 447 U.S. 255 (1980), is a case very close in point to the factual situation now before this Court. In the *Agins* case there had not been submitted a plan for development of the property, just as there had not been a plan submitted to develop the property subject to this lawsuit prior to 1980-1981. The Bank in this case had not, prior to filing suit and trial, presented a plan for development of the property that was in compliance with either the zoning ordinances or subdivision regulations in effect in 1981 when it submitted its first preliminary plan, or those in effect in 1973 upon which it claims certain rights. In the *Agins* case, the Supreme Court refers to this issue in Footnote 9 as follows:

... even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership.' They cannot be considered a taking in the constitutional sense. *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed 240 (1939).

In all prior decisions, such as *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), where the Court found that a regulation might amount to a "taking", the remedy afforded to the complaining party was invalidation of the regulation, rather

than any award of compensatory damages or mandate of formal condemnation of the property. There is no authority whatsoever to find that there was a "taking" where, as in this case, the property owner cannot establish any rights under any earlier ordinances or regulations, and such ordinances and regulations have not been changed so as to affect the development of the property. If the property sought to be developed by the Bank could not be developed under the regulations in effect either in 1980 or in 1973, then there cannot be found to be a "taking" under any constitutional theory and no damages should be afforded to this respondent. The facts are simply that the topography of the land left for development after the condemnation of 18.5 acres and the development of the golf course, as well as the development of other developable land, prevents the addition of the number of building sites the Bank desired. The District Court and jury found that the Bank received all prerequisite due process, both substantive and procedural. This finding was not overturned by the U.S. Court of Appeals for the Sixth Circuit in its decision. Further, the District Court had found the zoning ordinances and subdivision regulations as applied by the Planning Commission to the plats submitted by the Bank in 1981 were *rationally applied*, and, again, this decision was not overturned by the U.S. Court of Appeals for the Sixth Circuit.

It is elementary to state that there can be no taking unless there is some right in existence which a person or entity is deprived of and which is entitled to protection. This supposed right must be in existence and must be diminished or destroyed in order for any cause of action to arise. Without approval of a final plat of the property which the Bank seeks to develop, no right could be acquired by the Bank, and, therefore, no right is violated. *Goldblatt v. Town of Hempstead, New York*, 369 U.S. 590 (1962); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); and *Gorieb v. Fox*, 274 U.S. 603 (1927).

The majority opinion of the U.S. Court of Appeals for the Sixth Circuit erroneously finds that there was no remaining economically viable use of the Bank's property, based solely on the expert testimony of Mr. Hunt, who is an *appraiser* and not an engineer. It is clear that his testimony was based strictly

upon the interpretations of the Planning Commission's actions supplied to him by Mr. Ragsdale, the Bank's employee. The majority opinion of the U.S. Court of Appeals obviously ignores significant and contradictory evidence contained in the transcript, as well as competent engineering data offered by both the experts for the Planning Commission and the experts for the Bank, in finding that there was "no convincing evidence offered to contradict" Mr. Hunt's testimony. The majority also ignores the testimony of Morton Stein, the county planner, who is equally qualified as an expert in the area of planning. It was clear from his and Mr. Martin's testimony at trial, that approximately 558 building units in addition to the 27-hole private golf course could be located on the property for the total development. The Court also apparently ignored eight specific objections raised by the Planning Commission in rejecting the preliminary plat submitted by the Bank in June 1981 (R. 1570, J.A.220).

The majority, although ignoring this testimony for reasons unknown to this writer, concedes that if there could be 336 additional units built on the property, then the development certainly would retain economically viable use (Footnote 5, p. 8, Majority Opinion, the U.S. Court of Appeals for the Sixth Circuit, J.A.52). The majority also seems to ignore the fact that the Bank, relying upon the prior developer's rights, tends to exclude the fact that the property as a whole certainly contains some economically viable use in that at the time of trial there were approximately 212 approved building units in that development, most if not practically all of which were already constructed and sold, plus a large 27-hole private golf course in full operation. Judge Wellford, U.S. Court of Appeals for the Sixth Circuit, in his well-reasoned dissent, after apparently examining the evidence ignored by the majority, finds "Examination of the record before us, however, indicates that there was virtually conceded that even by applying 1979 standards, a total of 548 would be approved on the property." This figure, 548 units, less the 212 already finally platted and approved, equal the 336 additional building sites conceded by the majority to constitute economically viable use.

Further, as Judge Wellford indicates, "the cases cited by the majority do not, in my view, support the result which they

reach" (dissenting opinion, p. 19), and in particular, Judge Wellford, at p. 20 of the Court of Appeals opinion, cites the recent holding by the U.S. Court of Appeals for the Fifth Circuit *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir.1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd. after remand*, 699 F.2d 734 (1983).

The U.S. Court of Appeals for the Sixth Circuit has, for reasons unknown, ignored substantial portions of the transcript presented to it, and obviously had not viewed the preliminary plats submitted into evidence (Pl.Ex.9701, J.A.423, R. 223, 226; Pl.Ex.9702, J.A.424, R. 233, 234), which indicate the changes that were made after the original preliminary plat was submitted in 1973. The majority of the Court should have treated the Temple Hills Development as a single entity in determining whether the standard of economical viable use had been violated. The court in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), was explicit that:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole. 438 U.S. at 130-131.

In the present case, the entire Temple Hills Development was under one ownership at the time the development received preliminary sketch approval in 1973. When the developer defaulted, the Bank foreclosed on the undeveloped portion of the property. At that time, the golf course had been built and was operating, and 212 units had been finally approved and platted, many of which had in fact been constructed. There was substantial economic use permitted by the Commission.

There is no just reason why the Bank should stand in any better position than the previous owner as far as the taking issue is concerned. When the Bank purchased the property, it knew the Commission had disapproved a plat very similar to the one the Bank later submitted to the Commission. (R. 857, J.A.190). The Bank also knew the Planning Commission had

since 1979 been applying the amended and more restrictive regulations. The Bank had no reasonable expectation that it would be permitted to do what the prior developer could not do. The fact that the Bank may lose money as a lender to the developer of the subdivision certainly does not constitute a "taking" under any judicial application.

It is submitted, however, that for reasons other than those pertinent to this matter, the Court ought to consider a final definition of what constitutes a "taking" and appropriate damages should such occur. It is necessary that this Court define a "taking" for constitutional purposes as may relate to land use planning. In order to properly determine a definitional standard for a constitutional taking, it will be necessary to examine the history of the Fifth and Fourteenth Amendments as applied to the particular facts surrounding purported takings in land use planning cases, and compare those cases to the facts of the instant case. The Fifth Amendment of the Constitution provides in pertinent part:

No person shall . . . be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

Within that short provision, the clause requiring due process of law is joined injunctively with the clause prohibiting the taking of private property for public use without just compensation. While the courts have walked a very tight rope for a number of years in trying to distinguish the due process provision from the taking provision, it is suggested that perhaps there really is no proper distinction between the two. There certainly can be no question that individual purposes or individual desires, for whatever reasons motivated, must yield in appropriate situations to the public need.

In this case, both the District Court, in its granting the Planning Commission's Motion for Judgment Notwithstanding the Verdict and for a Directed Verdict on certain issues, and the jury found that the Bank received all necessary and prerequisite due process, both substantive and procedural. No challenge has been made to the constitutionality of the zoning ordinances and subdivision regulations, even as amended from time to time. Further, the Court found that the zoning ordinances and subdivi-

vision regulations applied by the Planning Commission to the plats submitted by the Bank were rationally applied. The question before the U.S. Court of Appeals was merely, "Was there 'a taking' in the constitutional sense?" The important question is whether the action or inaction at issue constitutes "a taking" in the constitutional sense. There can be no "taking" until there exists some right as to which a person is entitled to protection. In this case, the Bank had no rights in the 1973 approval of its predecessor's preliminary plat which had been adversely affected or taken in a constitutional sense, either because of violation of due process or otherwise. The Bank's 1981 preliminary plat never received any approval, and therefore the Bank could acquire no rights in the property which could be violated. There had been no change in the zoning ordinances and subdivision regulations that affected the property after the Bank acquired the property and submitted the plat for approval.

Before considering a remedy, the Court must first decide what violation of the Plaintiff's rights, if any, was caused by the change in zoning ordinances or subdivision regulations, or by the simple disapproval of a preliminary plat in accordance with those subdivision regulations. Before a court can grant compensation, or declare zoning ordinances and subdivision regulations invalid, it must determine the basis for that relief. Before a remedy for a "taking" is fashioned, the standard for determining whether a "taking" has occurred must be established. A remedy based on a mistaken standard is no remedy at all, but merely a violation of the Petitioner-Defendant's rights.

Justice Brennan's dissenting opinion in *San Diego Gas* appears, from the language contained therein, to be a sharp departure from his opinion in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). It is interesting to note that Justice Brennan apparently relies upon Justice Holmes' "test" set forth in the *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) decision, commonly known as the "too far" test. Building the test for a "taking" on the basis of the decision in *Mahon* is akin to building one's castle on quicksand. The decision also seems to be in accord with the earliest case in this line, *Mugler v. Kansas*, 123 U.S. 623 (1887), which held that no exercise of police power could constitute a "taking". It is also interesting to note that the dissent by Justice Brennan in the *San Diego Gas*

case cites for support cases supposedly supporting *Mugler* rather than *Mahon*, such as *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), and *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590 (1962), all of which were cited with approval by Justice Brennan in his *Penn Central* decision. Although the dissent seems to reject *Mugler* and the *San Diego Gas* case and not *Mahon*, the problem, it is suggested, is that the "too far test" set forth by Justice Holmes is really no different than the test in *Mugler*, which is a substantive due process test. It is also interesting to note that if we follow the *Mahon* "too far test", then the remedy set forth in that case is to invalidate the statute and not consider whether there would be a compensable taking. To follow Justice Brennan's dissent in *San Diego Gas* would adopt the *Mahon* test for a "taking", but would reject the remedy set forth therein.

In deciding the *Agins v. City of Tiburon* case, Justice Brennan states that the California Court set out a *due process* test for the validation of land use regulations, 447 U.S. 255, 263, Note 9, (1980). If so, *Mahon* must also adopt a due process test. Thus the Supreme Court held in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95, that the same "too far test" was equivalent to the "unduly oppressive test".

Inverse condemnation and eminent domain theories require, according to Justice Brennan, that a "taking" occur. A "taking" connotes a transfer. In order for a "taking" to occur, some governmental entity must take some action to affect the private owner's "property" rights. For these purposes, and according to the "taking test", there must be a transfer such that the owner of the property loses certain property rights and the governmental entity receives a corresponding right. The "effect" of regulation of the type at issue is not the transfer of any property right. Therefore, there cannot be a "taking."

The appropriate consideration in this case is whether the Bank has been denied substantive due process, and not whether there have been any property rights taken. If there has been a violation of any due process as a result of the Planning Commission's determination that the preliminary plat submitted in 1981 failed to comply with either the zoning ordinances or subdivision regulations in effect as amended in 1981, then

invalidation of those regulations would be the remedy. However, it is clear from the facts of this case that there can be no invalidation of the earlier 1973 zoning ordinances and subdivision regulations with which the Bank's plat submitted in 1981 cannot comply, because its predecessors in interest initially sought and obtained approval of other portions of this development under those 1973 ordinances. Further, the District Court and the jury have found that the Bank and its predecessors have been afforded all requisite due process, both procedural and substantive. This being the case, there is no basis for invalidation of either the 1973 or amended regulations, nor can there be any damages available to the Bank under the provisions of 42 U.S.C. § 1983.

Even assuming that the "taking" issue could be considered separate and apart from due process considerations, one would then have to find that the Bank had some prior right in the development at Temple Hills which was adversely affected in order for the upgrading of the subdivision regulations and zoning ordinances in 1977 to constitute a "taking". It is submitted that the upgrading or the amending of those ordinances and regulations by the County Commission (which is not a party to this suit), or by the Planning Commission, does not give rise to any action on behalf of the Bank. There can be no "taking" if there have been no rights established.

The earliest case regarding a "taking" was *Mugler v. Kansas*, 123 U.S. 623 (1887) which is really a due process case. The Supreme Court held that even though a statute which prohibited manufacture of intoxicating liquors rendered a brewery *worthless*, such legislation did not constitute a "taking" of property that required compensation because the legislation was for the protection of the health, safety and morals of the community. In the instant case, the Planning Commission is specifically charged, as part of its sworn duties to protect the health, safety and morals of the community which it serves. The validity and constitutionality of the zoning ordinances and subdivision regulations in the present case were acknowledged by the District Court, which found all such regulations and ordinances to be enacted for the health, safety and welfare of the public. The District Court also found that such ordinances and regulation had

been rationally applied and that all actions of the Commission were taken pursuant thereto. The Bank has never raised the issue of whether the subdivision regulations and zoning ordinances were unconstitutionally enacted.

The premises set forth in the *Mugler* decision have continued to be valid, and were re-emphasized in *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). The courts have always recognized a continuing need, as growth and urban expansion continue, for the upgrading of zoning ordinances and subdivision regulations. This includes upgrading which would restrict or interfere to some degree with the property owner's right of development. The Supreme Court has recognized the constitutionality of zoning ordinances as a valid exercise of police power, even though the effect of such ordinances may be to substantially reduce the value of the land by restricting uses for which it might ultimately be used. In *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Supreme Court found zoning ordinances to be constitutional even though the value of the property may have been reduced by as much as 75%.

In continuing to uphold the constitutionality of zoning ordinances, the Supreme Court in *Goriet v. Fox*, 247 U.S. 603 (1927), indicated that developmental regulations should not and would not be overturned by the courts unless there was a clear showing that such regulations were arbitrary and unreasonable and bore no substantial relationship to the public's health, safety, morals or general welfare. In the present case, the District Court has found the zoning ordinances and subdivision regulations were enacted for the public's safety, health, morals and general welfare, and were rationally applied to the Temple Hills Development, and the U.S. Court of Appeals for the Sixth Circuit did not disturb those findings. The only change in zoning ordinances that affected the Temple Hills Development was a change enacted by the County Commission, not the Planning Commission, in 1977, at a time when there was not an approved plat in effect for the Temple Hills Development. This change required 10% of the gross acreage to be deducted for roads when computing density, and that an acre be computed as 43,560 sq. ft. as opposed to 40,000 sq. ft. The application of this change would at most be only an 18% reduction of the number of dwelling units that could be placed upon the de-

velopment. Even given this reduction, the total number that could still be developed on the property exceeds the original number approved in 1973, that being 469 units. Whether the area for roads should have been considered in computing for density in 1973 is questionable. However, the density calculation was not a consideration at that time because of the large area not approved for development, but specifically reserved on a preliminary plat for approval at a later time. The Bank complains of the application of the upgraded zoning ordinances to its request for approval of a preliminary plat, but in doing so it ignores the fact that there was a gap in the approval of previous plats for the Temple Hills Development upon which the Bank now tries to tack its rights. The preliminary plat approved on June 19, 1975 expired on June 19, 1976 (Pl.Ex. 9701, J.A.423, R. 223, 226; Def.Ex. 84, R. 1083, 1084). This was in accordance with subdivision regulations of Williamson County, Article II, B-7 (Def.Ex. 110, R. 1065; Def.Ex.111, R. 1184, 1188). The preliminary plat was again submitted to the Planning Commission in April 1978 for reapproval after the zoning ordinances had changed. The plat, having previously expired, had to then be approved under the new zoning ordinances then in effect. The Planning Commission did not have the authority to waive or vary the zoning ordinances. The Bank could have acquired no greater right than the approval given to the preliminary plat in 1978 under the new 1977 zoning ordinances.

In the present case, the District Court, as a matter of law, properly entered Judgment Notwithstanding the Verdict on the "taking" issue. It is clear that the Bank was aware of the zoning ordinances and subdivision regulations in effect in 1973, as well as those in effect in 1980 when it purchased the property. It was also aware that at the time it purchased the property a prior developer had submitted an almost identical plan it proposed to submit, which had been rejected by the Planning Commission. Further, the Bank was aware that in 1979 the Planning Commission enacted an amendment to its subdivision regulations that required all the current regulations and zoning ordinances to be applied to all preliminary plats being renewed after the initial approval period had expired. The Bank was also aware when it acquired property ownership in 1980 that a preliminary plat had been approved in 1979 sub-

ject to the then current regulations. There can be no "taking" or other action akin to "inverse condemnation" where the developer or owner, the Bank in this case, had prior knowledge of the conditions of which it complains. *City of Walnut Creek v. Leadership Housing System, Inc.*, 73 Cal. App. 3d 611, 140 Cal. Rptr. 690 (1977).

The Bank has asserted that it has been deprived of any economically viable use of its property. It is important to note that at the time of the action involved in this case neither the U.S. Supreme Court, nor any court affecting the parties, had ever explicitly held that regulations which deprive an owner of a reasonable beneficial use of his property constitute a "taking" of that property. Neither has the Supreme Court, or any other court of pertinent jurisdiction to this matter, found that oppressive regulations give rise to an action for inverse condemnation. The applicable decisions only hold that where restrictions go "too far", the regulations which place such restrictions on the property should be invalidated.

The petitioners suggest that the case of *Agins v. City of Tiburon*, 447 U.S. 255 (1980) is very close in point to the factual situation in the present case. In fact, the *Agins* decision ought to be determinative of this matter. In the *Agins* case no plan had been submitted for the development of the property. The same situation existed in this case in 1981. The plaintiff had not presented a plan for development that was in compliance with either the zoning ordinances and subdivision regulations in effect in 1981, or those in effect in 1973, under which it seeks review. It is of special importance to note the language contained in the *Agins* decision at page 262. The court found that the ordinances involved in that case might limit the development, but the ordinances did not prevent the use of appellant's land. Nor did such ordinances extinguish any fundamental attributable right of ownership. As in that case, the jury in this case and the court have allowed plaintiff to proceed under the zoning ordinances and subdivision regulations previously in effect. Footnote 9, at p. 263 of the *Agins* decision, should be determinative of the issues in this case, and should be sufficient to support the District Court's granting of the Judgment Notwithstanding the Verdict, and to reverse the U.S. Court of Appeals

for the Sixth Circuit's majority opinion. That Footnote reads as follows:

The appellants also claim that the city's precondemnation activities constitute a taking. See Notes, 1, 3, and 5, *supra*. The State Supreme Court correctly rejected a contention that the municipality's good faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellant's enjoyment of their property as to constitute a taking. See also *City of Walnut Creek v. Leadership Housing System, Inc.*, 73 Cal. App. 3d 611, 620-624, 140 Cal. Rpt. 690, 695-697 (1977). Even if the appellant's ability to sell their property was limited during the pendency of the condemnation proceedings, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership." They cannot be considered a "taking" in the constitutional sense. *Danforth v. United States*, 308 U.S. 271 (1939).

By allowing the Bank to proceed under the 1973 zoning ordinances, the Bank will be able to develop the property under the old regulations, which will allow more units to be built upon the property with a drastic decrease in developmental cost. The only reason the Bank disagreed with the District Court's decision is that it could not, or it refuses to try to, comply with even the 1973 regulations under the preliminary plat it submitted in 1981.

After appeal was filed in the U.S. Court of Appeals for the Sixth Circuit, a cross-appeal was also filed on behalf of the Planning Commission, contesting the District Court's ruling that the 1973 regulations as opposed to those in effect in 1981 should be applied to the property. At that time, through negotiations with the Planning Commission's county planner and the county attorney, the Bank did reach an agreement and submit an additional preliminary plat with many modifications from that submitted in June 1981 to the Planning Commission for approval. This plat was in fact approved by the Planning Com-

mission, and allowed the Bank to construct 476 additional dwelling units on its property (A. to Brief). This approval of the preliminary plat should make the issue before this Court moot. It is obvious that the Bank's property contained substantial economically viable use since it has obtained approval of a preliminary plat. It should also be noted that this was the first time the Bank had ever requested variances of subdivision regulations and zoning ordinances in order to have a plat approved. If the Bank had proceeded to request these variances in 1981 and pursued its administrative remedies or state remedies at that time, the matter need not have gone into litigation.

It is suggested that there is no authority whatsoever to find a "taking" where, as in this case, the property owner cannot establish its rights under earlier ordinances or regulations. If the property could not be developed under either the 1973 ordinances and regulations because of the topography of the land that was left after the initial construction phase of the 212 dwelling units that were given final approval by the Commission, development of the golf course and the condemnation of 18.5 acres, none of those matters were within the control of the Planning Commission. If the original acreage was in fact contained within the development and it was flat, there would be no controversy here. However, the Bank readily admits that its predecessors used most of the flat land in the Temple Hills Development for the construction of the golf course and other common improvements. The Bank's inability to develop the property as it desired is the result of the natural characteristics of the property which it purchased, as well as the activities of prior developers who chose to use the best land within the project for purposes other than building units. Any changes that have occurred in the zoning ordinances and subdivision regulations as applied to the property by the Planning Commission were minor and do not constitute any type of action that severely affected the property, as in the *San Diego Gas* case or other cases relied upon by the Bank. The Bank's appeal to the U.S. Court of Appeals for the Sixth Circuit seemed to even assert that the application of the 1973 zoning ordinances and subdivision regulations, which at the trial level it had sought to have applied to the development, would constitute a violation of its Fifth Amendment rights. This argument must be perceived

as totally incredible in light of the fact that the Bank's predecessor specifically sought the enactment of those zoning ordinances and subdivision regulations so that the property could be developed pursuant thereto. It is questionable in this case whether the Bank had any property right that has been affected at all by the action of the Planning Commission. It may be unfortunate that the Bank made an error of judgment in buying property that was too rugged and steep to be developed in the same manner with the same number of building units that could be placed legitimately upon flat land. However, the Bank's error or mistake certainly cannot be chargeable to the Planning Commission or the people of Williamson County, and certainly does not rise to the level of any constitutionally protected right. If the Bank made an error in its judgment in determining the economic feasibility of developing the property, knowing full well all the ordinances and subdivision regulations that were applicable to the property, the net cost of the error of the Bank can receive no constitutional protection given the facts of this case.

It is obvious that the judge at the District Court level, after reviewing all the facts, determined that there was not sufficient evidence to submit to the jury the issue of whether or not there had been a violation of the just compensation clause of the Fifth Amendment of the United States Constitution. The District Court therefore ruled as a matter of law that there was insufficient evidence presented to raise a material issue of fact as to whether or not there had been a "taking". The Bank's failure to submit a plat to the Planning Commission prior to the time it filed suit, which complied at a minimum with standards in effect in 1973, prohibits the Bank as a matter of law from obtaining judgment in its favor for violation of the Fifth Amendment.

It is equally as obvious that the majority writing for the U.S. Court of Appeals for the Sixth Circuit ignored the fact that the Bank had failed to establish any rights that had been violated as a result of the Planning Commission's action by its failure to submit a plat that complied with the earlier regulations. The majority, ignoring much evidence to the contrary, seemed to rely particularly upon the testimony of the expert for the Bank. It is asserted that the majority's reliance upon that testimony is

misplaced. In fact, they overlooked the basic considerations that must be addressed before looking to whether there has been any denial of economically viable use.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the District Court's Judgment Notwithstanding the Verdict should be reinstated.

Respectfully submitted,

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No. 84-4

In THE
Supreme Court of the United States
OCTOBER TERM, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL,
Petitioners,
v.
HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPENDIX TO BRIEF FOR THE PETITIONERS

AGREEMENT

WHEREAS, there is now pending in the United States Circuit Court in Cincinnati, Ohio, an action between the Williamson County Regional Planning Commission, hereinafter "the Commission", and the Hamilton Bank, hereinafter "the Bank", being Cause No. 82-5432, wherein the Commission is appealing the judgment of the U.S. District Court, Middle Tennessee,

decreeing that 1973 standards must be applied to the Bank's application for plat approval, and,

WHEREAS, the Bank is desirous of obtaining Sketch Plan approval, and particularly is most concerned with having approval of an additional 476 units, which are permissible under the 1973 regulations, but not under later regulations, and,

WHEREAS, the Commission's primary concern in the case is the potentiality of being required to approve a plat with oil and chip roads, permissible under 1973 regulations, but which would place substantial financial burdens on the county for upkeep and maintenance, and,

WHEREAS, these parties are under constraint by the Conference Clerk of the U.S. District Court to resolve these differences, if possible, expressly due to the Case load of that Court, and,

WHEREAS, it appears to all parties that a compromise and settlement of differences in this cause, if approved by the Court, would be beneficial to all these parties, as well as to the existing residents of the Temple Hills area who have a vested interest in the proper completion of this project,

NOW THEREFORE WITNESS: that the Bank in order to obtain approval of a Sketch Plan for the Bank's portion of the Temple Hills Development agrees to the following terms and conditions:

1. Provide open space easement to the County for the additional open space indicated on the Sketch Plan and make provision for maintenance of such before approval of any final plats past (100) units.
2. All new roads shall be built to the following standards: Curbed sections with base to accommodate twenty-four (24) feet of actual driving surface; single shot of oil to seal complete base to stand for a minimum of one (1) year after construction; and two (2) inches of hot mix for final topping to be applied before acceptance of roads by County.
3. Temple Road will be rebuilt to the following standards: Engineer for the Bank and Williamson County Highway Superintendent inspect Temple Road and agree on necessary

work to repair existing road. Highway Commission and the Bank will agree on work to be performed by each and the Bank will pay for all materials at a predetermined unit price. The repair work will be accomplished during the construction period of 1983. The Bank agrees to resurface Temple Road contained in the Temple Hills Development with two (2) inches of hot mix after eighty (80%) of the developer's land is developed or five (5) years after the first final plat on the new development of Temple Hills is approved, whichever is first.

4. The emergency road indicated at the end of Canterbury Lane in the Sketch Plan looping back to Canterbury Lane next to the cemetery shall be a public road built to the standards of the other roads provided concurrence for such can be obtained from the golf course.
5. Before construction of the road serving lots 29C, 30C, 31C, and 32C a detailed geologic and engineering study shall be performed and the design approved. Close supervision by a geologist/engineer shall be made during construction to insure proper construction of this road on unstable soils as indicated.
6. The commercial area indicated on the Sketch Plan will be a traditional retail curb market with gas service only as noted on the Plan approved February 24, 1983.
7. If there are problems with drainage on indicated lots, the units can be relocated provided they are not placed on unstable soils, the 1973 Zoning provisions are not violated and the basic design is not violated.
8. The parties to this agreement recognize that the Commission does not have the authority to withhold plat approval in order to review architectural plans of proposed cluster units. Nonetheless, in a spirit of good faith the Bank agrees to the establishment of an architectural review committee of existing homeowners that shall be provided with design specifications before the cluster units are built. This committee shall have the right to review all specifications and communicate any comments to the developer. The developer shall make all final decisions on ar-

chitectural design, and nothing in this agreement shall be construed to diminish or defeat the right, or to create any rights other than the right of review in the committee.

FURTHER WITNESS that the Commission agrees to the following terms and conditions:

1. Approve a maximum of 476 units on the property now owned by The Bank. This means that there are no areas considered as steep slopes in calculating the density for the Temple Hills Development.
2. Grant variances of the 1973 subdivision regulations for permanent cul-de-sacs and road grades as indicated on the Sketch Plan approved February 24, 1983.
3. The Commission agrees to apply 1973 regulations in all other respects except as changed by this agreement or by other provisions as noted on the plat.

Witness our hands this 10th day of March, 1983.

/s/ CAROLYN E. WATERS

Secretary, Williamson County
Regional Planning Commission
The Hamilton Bank of Johnson City
By:

/s/ RALPH M. KILLEBREW

Executive Vice-President of
Ancorp Corporation

STATE OF TENNESSEE
COUNTY OF WILLIAMSON

Personally appeared before me, /s/ James D. Petersen a Notary Public in aforesaid county and state, the within named CAROLYN WATERS, who made oath that she is the duly elected Secretary of the Williamson County Regional Planning Commission, and that she executed the above document, after being duly authorized to do so by vote of the Williamson County Regional Planning Commission at its regular meeting on February 24, 1983.

/s/ James D. Petersen

NOTARY PUBLIC

My Commission expires:

7-10-85

STATE OF TENNESSEE
COUNTY OF WILLIAMSON

Personally appeared before me, /s/ James D. Peterson, a Notary Public in and for the above said county and state, the witness named RALPH M. KILLEBREW who made oath that he is the Executive Vice President of Ancorp, Inc., a holding company of the HAMILTON BANK OF JOHNSON CITY and that in that capacity he is duly authorized to execute this document for the purpose therein contained.

/s/ James D. Petersen

NOTARY PUBLIC

My Commission expires:

7-10-85

MOTION FILED

NOV 15 1984

No. 84-4 ⁴

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, *et al.*,

Petitioners
v.

HAMILTON BANK OF JOHNSON CITY,
Respondent

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE
AND BRIEF AMICUS CURIAE OF
THE NATIONAL ASSOCIATION OF COUNTIES,
THE INTERNATIONAL CITY MANAGEMENT
ASSOCIATION, THE NATIONAL LEAGUE OF CITIES,
THE U.S. CONFERENCE OF MAYORS,
THE NATIONAL CONFERENCE OF STATE
LEGISLATURES, THE NATIONAL GOVERNORS'
ASSOCIATION, AND THE AMERICAN PLANNING
ASSOCIATION

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QUESTION PRESENTED

Whether, and in what circumstances, an exercise of government's power to regulate gives rise to a claim for compensation or damages.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-4

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, *et al.*,
Petitioners

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent

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STATE LEGISLATURES,
THE NATIONAL GOVERNORS' ASSOCIATION, AND
THE AMERICAN PLANNING ASSOCIATION

Pursuant to Rule 36 of the Rules of the Court, *amici*
hereby seek leave to file the attached brief *amicus curiae*
in support of the Williamson County Regional Planning
Commission.*

* Petitioner has consented to the filing of this brief. Respondent
has not.

The *amici* are organizations whose members include state, city and county governments and officials located throughout the United States, and an organization comprised of city and regional planners and officials concerned with planning. Constitutional issues affecting the power of government to regulate and plan in the public interest are of vital importance to *amici* and their members. This case presents such an issue, since it involves the question whether, and in what circumstances, governmental bodies will be liable to pay compensation or damages to a party whose business or property is affected by an exercise of the police power. If the issue is decided adversely to petitioner, the costs of government at every level may vastly increase, and the ability of government to regulate in the public interest may be crippled. Such untoward consequences would arise not just in the field of land use planning, with which this case is immediately concerned, but in other areas of governmental regulation as well. For these reasons *amici* are deeply concerned over the outcome of this case, and are submitting this brief to assist the Court in its consideration of the matter.

Respectfully submitted,

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INTEREST OF THE AMICI

The interest of the *amici* is set forth in the motion for
leave to file this brief.

SUMMARY OF ARGUMENT

A. The critical question of this case is whether government is liable to pay compensation when, in the exercise of its power to protect the public interest, it alters regulations which previously governed a business or a commercial project.

An affirmative answer to this question is pregnant with debilitating consequences in a host of regulatory fields. Such an answer would expose government to financial liability of monumental, and literally incalculable, proportions. It would cause paralysis in the regulatory process. It would thwart the sequential, or staged, regulation and development which is necessary in numerous fields because of the complexities of modern technology. And it would cause courts to be swamped with lawsuits brought by businessmen claiming that their businesses or projects failed because of changes in regulation.

These adverse consequences should make this tribunal hesitant to adopt a rule of liability which, because it is constitutional, will be cast in stone for years to come. Moreover, this case is an inappropriate vehicle for establishing such a rule, which is sought by respondent. For not only are enough facts known to warrant reversal of the lower court's decision in respondent's favor, but additional facts relevant to the rule contended for by respondent do not appear to be in the record, and facts which *are* in the record often are murky at best.

B. Land use regulation occurs sequentially or in stages. Land developers play a highly influential role in this staged process. Also, both they and local governments receive extensive benefits from it. It is thus used in connection with virtually every development of any size in this country.

Under the staged process, both initial and subsequent approvals are required. This is reflected in the docu-

ments submitted by the developer at the different stages. Those documents become progressively more detailed or of different character. Thus, documents submitted at later stages may fail of approval though earlier documents gained approval.

Cluster planned developments go through the same staged process as standard developments. The only difference between the two types of developments lies in the manner in which they meet overall density requirements established by land use regulations. Clustered developments are allowed to meet these requirements by grouping or clustering houses on portions of the property, and are thereby enabled to obtain highly significant commercial advantages.

C. Well established legal principles govern the question whether a change in regulations gives rise to a claim for compensation or damages.

For scores of years it has been established that governments at every level have broad power to regulate economic activities. They can do so without liability even though regulation diminishes the value of property. Otherwise government could not go on, authorities would have to regulate by purchase rather than by rule, and courts would be enmeshed in speculative predictions of profit allegedly lost due to regulation.

It is possible, however, that there could be egregious circumstances in which regulation gives rise to a compensable loss. But such exceptions must be carefully circumscribed lest debilitating consequences ensue. The exceptions should be confined to cases in which government is not acting in good faith pursuit of legitimate state interests. Also, in considering exceptions, three established principles must be taken into account:

First, in the absence of extraordinary delay, the passage of time during the process of governmental deci-

sionmaking does not give rise to a claim for compensation.

Second, for there to be a compensable loss due to regulation, an owner must be denied all viable economic use of his property. In determining whether there has been denial of such use, the property must be considered as a whole. Nor does mere loss of interest or rental value in itself constitute loss of viable economic use, since property may have extensive use and value despite such loss.

Third, the party claiming compensable loss must be able to show that its loss was in fact caused by a change in governmental regulations rather than by some other factor.

D. (1) The facts in this case show that, under governing principles, the decision below should be reversed:

(a) There was no bad faith pursuit of illegitimate objectives by any governmental agency or official in this case. Rather the jury specifically found that the defendants acted in good faith.

(b) Respondent is seeking damages for delay caused by regulation. The claim fails because the local government agencies acted promptly and with no extraordinary delay. Indeed the regulatory process was much shorter than it permissibly could have been, since respondent chose not to seek a variance, which would have extended the process, and instead filed a lawsuit. Most of the delay was incurred during respondent's suit.

(c) The truly insurmountable obstacles faced by respondent appear to have been density and slope requirements which existed in 1973 and were not subsequently changed. Since these requirements remained unaltered, respondent cannot validly claim it suffered loss because of a change in regulations.

(d) Approval of the initial sketch plat in 1973 did not create a right to build a total of 736 houses, as claimed by respondent. The 1973 plat lacked essential information which only became available in connection with later plats and which caused them to be properly disapproved. Further, the initial plat specifically stated that substantial portions of the land were not to be developed until approved by the planning commission. Finally, basic assumptions of the initial sketch plat were not fulfilled by the developer.

(2) If the decision below is not reversed outright, then the case should be remanded for development of absent facts which are highly pertinent to the question whether regulation can give rise to a compensable taking.

(a) For all that appears in the record, the project as a whole may realize a significant profit. If so, there can be no denial of viable economic use and no compensable taking.

Respondent, however, wishes to divide the project into segments and to recover the interest lost on one of those segments. However, it is established law that the project must be viewed in its entirety, not in sections. Further, lost interest does not constitute a denial of viable economic use, since the property may have extensive use and value despite such loss.

(b) Even if the project as a whole will suffer an overall loss, the record does not show that governmental regulation is the cause of the loss. Nor can such causation merely be assumed. This is only the more true because facts subject to judicial notice show the loss could easily have been caused by serious declines in the housing market in the Nashville area, declines paralleling those which occurred elsewhere in the nation.

ARGUMENT

I. Introduction

The instant case involves a land use controversy arising in a suburban area of Nashville, Tennessee. In this controversy it is claimed that delay in the development of a parcel of land, when caused by new regulations, gives rise to a compensable taking under the Fifth Amendment.

But though the case comes clothed as only a land use matter, it actually is of far broader and more crucial importance to government at every level. For the critical question of the case is whether government is liable in damages when, in the exercise of its power to protect the public welfare, it alters regulations which previously have governed a business or a commercial project. Such regulatory changes, made to protect the public interest, and often based on new or fuller information, are a commonplace of governmental and commercial life. They occur daily in every area from land use planning, to the construction of nuclear power plants, to the sale and distribution of ethical drugs. They occur regularly in fields in which private entities had to secure previous approvals under prior rules. If the regulatory changes give rise to a right of compensation because private entities expected that prior rules would remain in place, and may have made investments based on such expectations, then the dollar amount of liability to which governments at every level will be subject is quite literally incalculable. It probably is conservative to estimate it as being tens of billions of dollars per year.

Not only is the potential financial liability of monumental proportions, but the effect on the governmental process could be paralyzing. For to avoid the potentially large liability flowing from changes in rules and regulations, government would have to refrain from making changes which new information and ideas show to be

necessary for the public welfare. Or, sometimes even worse, government might avoid granting *initial* permission for projects lest it thereby be precluded from making later changes which experience and information show to be necessary. A lack of initial permissions would be as undesirable for businessmen as for government, since businessmen will be reluctant to proceed with projects in the absence of the initial approvals.¹

The portentous consequences at stake here are the more debilitating because the complexities of modern life and technology make it essential for large projects to be developed, and to be subjected to regulation, in stages. Large land developments—just like large nuclear plants or modern bombers—are not fully planned and approved in one fell swoop. Rather, within the context of overall goals, development and approvals occur in stages. If governing regulations cannot be altered to reflect enhanced information and changed facts, then the process of *staged* development and approval will be thwarted—a process made inherently necessary by modern conditions will be stymied.

Nor do the foregoing consequences exhaust the list of undesirable probabilities. Another likelihood is that, whenever commercial projects fail, as occurs uncounted times daily, businessmen seeking to recoup their losses will file lawsuits claiming the failures are due to compensable changes in governmental rules and regulations. The courts will thus be swamped with litigation involving complex economic questions of the origins and causes of business failures.

Thus this case is pregnant with adverse consequences. Those consequences are not confined to the field of land use planning—where they will of course be felt very heavily—but extend to a wide variety of other activities

¹ Sallet, Jonathan B., *The Problem of Municipal Liability for Zoning and Land Use Regulation*, 31 Cath.U.L.Rev. 465 (1982).

as well. The consequences should give a tribunal pause before laying down a rule of liability which, because it is constitutional, will be cast in stone for years to come.

Nor is this case an appropriate vehicle for laying down the rule of liability contended for by respondent. For, though *amici* believe enough facts are known to warrant an outright reversal, they are frank to say that several relevant facts do not appear to be in the record, and the facts which *are* in the record often are murky at best. Thus, if the case is not appropriate for reversal, it should be remanded for development of the facts pertinent to the question whether, and under what circumstances, a change in governmental regulations gives rise to a compensable taking.

II. Land Use Regulation and Development Is a Process Which Occurs in Stages, and Land Use Projects Must Receive Both Initial and Subsequent Approvals

A. We begin our discussion by describing pertinent features of land use regulation and development.

Land use regulation has been adopted by nearly every city, county and state in the country in order to provide for rational growth and development.² Recognizing the crucial need for this regulation, the Court has repeatedly approved it. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court, indeed, has pointed out that great deference must be shown to the decisions of local authorities engaged in land use planning. *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 388; see *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

² 8 McQuillin, *The Law of Municipal Corporations* § 25.04 (3rd ed. 1976).

The process of regulating and planning the use of land, and developing the land, is rarely one which occurs in a brief moment of time. Rather, the process is an ongoing one which occurs sequentially, or in stages. This is as true for individual projects such as large residential subdivisions as it is for whole new areas of cities and counties.

Staged planning and development is necessary because it is not possible to know all the relevant facts and details at the beginning. At the inception of a residential project, for example, unavailable information can and sometimes must include facts concerning the exact topography of portions of the land, the exact location of streets and houses, whether necessary dedications of open spaces, streets and public buildings such as schools will have been made, whether requirements such as inclusion of low or moderate income housing will have been met, whether sewage systems, water systems and houses will meet the engineering and safety standards of local codes, and the precise size, style and price of houses whose sale will be supported by market conditions existing when building actually occurs.

But though a host of relevant facts are not known at the inception, there nevertheless must be an inception if regulatory planning and commercial development are to proceed. For this reason, local land use laws provide for initial approvals of highly generalized plans for development. And, because protection of the public welfare requires continuing governmental oversight as plans and projects become more specific and concrete, the land use laws provide for subsequent approvals as a developer's plans become more detailed and approach closer to reality.

This staged process is one in which the developer plays a highly influential role, and from which both he and the local government benefit. The developer's role

is very influential because, in his presentations and arguments to local government officials, he explains his plans, his needs, the tax, developmental and other benefits to be derived from the project by the local government, the pros and cons of differing approaches to specific developmental problems, and other pertinent matters.

The developer benefits from the process because initial approval of generalized plans informs him that the local government will permit or welcome a project from which he hopes to make large profits, and because the later approvals permit him to actually construct and sell houses or other buildings. The local government benefits because the requirement of initial approval enables it to know of and rationally control development within its jurisdiction, while the requirement of later approvals enables it to protect the public welfare by ensuring that appropriate standards are met. Being of great benefit to both sides, the staged process is used in virtually every development of any size in this country.³

The differences between the initial generalized approval and more specific later approvals is reflected in the documents which the developer submits at the different stages. In general, there can be from two to five formally submitted documents, variously called by such names as the conceptual or initial sketch plan, the preliminary plat, and the final plat.⁴ The information given on these documents becomes progressively more detailed or of different character. Thus while the initial sketch plan gives only a generalized conceptual idea of the project, the preliminary plat contains sufficient construc-

³ International City Management Association and American Planning Association, *The Practice of Local Government Planning* (1979).

⁴ International City Management Association and American Planning Association, *The Practice of Local Government Planning*, (1979); Meshenberg, M., *The Language of Zoning*, ASPO Report No. 322 (1976).

tion and engineering data so that the project can be reviewed for compliance with land use regulations and the precise location of roads, buildings and utilities can be ascertained. From the preliminary plat, but not from preceding documents, one can ascertain the precise location, width, slope and curves of streets, the precise boundaries, size and configuration of lots, the exact setback lines on lots, the slope of lots, the location of connections for water, sewer and utility lines, the height of curbs, and other pertinent information. In some jurisdictions the preliminary plat is also accompanied by certificates of compliance with water, sewer, subdivision and zoning regulations; such certificates are issued by the appropriate local officials such as city or county health officers and engineers. (In other jurisdictions these certificates accompany the final plat.)

The final plat is a document which enters the chain of title. It sets forth such information from the preliminary plat as is necessary for title purposes, plus additional title information such as the legal boundaries of all lots owned in fee and of all easements created for the project. In most states it also serves to convey or dedicate areas for public use.⁵

Because the documents submitted by a developer become progressively more detailed or of different character, and later documents provide previously unavailable information enabling a local government to know whether its land use regulations are in fact being met, the later documents may fail to gain approval though the earlier ones have passed muster.⁶

⁵ In some areas information accompanying the final plat also enables authorities to know whether appropriate portions of the project have been set aside for low and moderate income housing and housing for the elderly.

⁶ A sequential or staged process similar to the one described in the text exists for major commercial or residential structures which

B. Cluster planned developments, such as the one contemplated in this case, involve the same staged process of approval and development as other residential housing projects. Thus, the only difference between a cluster planned development and a more standard development lies in the way in which the density requirements of a zoning law are met. For instance, when the overall density requirement limits the development to only one house per acre, a standard residential development will meet the law by placing every house on a separate acre of land. In cluster planning, however, the density requirement may be met by placing three houses on one acre, while leaving two acres as open space, parkland or forest.

By permitting a developer to meet density requirements by clustering houses, a zoning law gives him several advantages. Because of their large amounts of parkland and forest, cluster planned developments are often regarded as highly desirable, and houses in such developments may sell at a premium. Also, because large amounts of space are left free of residential construction, the developer may be able to save money by putting in shorter roads, sewer lines, water lines and electricity lines.

Finally, the developer benefits because he can take advantage of land which might be useless in a regular development. For example, if a portion of his property has slope or other problems which prevent houses from being built on it, in a standard project the developer might have to build, say, twenty less homes. But in a cluster planned development the "unbuildable" land can be used as open space and the twenty houses can be put on different portions of the property. In this way, the builder obtains great benefit from "unbuildable" land

do not require subdivisions. Usually referred to as "site plans", documents submitted under this procedure are used for shopping centers, office buildings and apartment buildings.

which would be useless in a standard development. That land thus has economic value in a clustered development that would be wholly lacking in a standard one.

III. Well Established Legal Principles Govern the Question Whether a Change in Regulations Creates a Right to Compensation or Damages

A. We turn now to a discussion of legal principles governing the issue whether a change in regulations gives rise to a claim for compensation or damages.

For scores of years it has been a truism that, to protect the public welfare, government at every level has broad power to regulate economic activity. *Hawaii Housing Authority v. Midkiff*, — U.S. —, 104 S.Ct. 2321 (1984); *Andrus v. Allard*, 444 U.S. 51 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Williamson v. Lee Optical Co. of Oklahoma*, 348 U.S. 483 (1955); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Economic regulations are therefore upheld if supportable on any reasonable basis. *Andrus v. Allard*, *supra*, 444 U.S. at 59; *Ferguson v. Skrupa*, *supra*, 372 U.S. at 729; *Williamson v. Lee Optical Co. of Oklahoma*, *supra*, 348 U.S. at 488; *Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 387.

Thus, in the field of land use planning, and in countless other areas as well, public interest regulation altering the status quo has been upheld though it greatly diminished or destroyed the value of businesses or projects whose success depended on continuation of that status quo. See *e.g.*, *Euclid v. Ambler Realty Co.*, *supra*, (75% diminution in value); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87½% diminution in value); see also, *Andrus v. Allard*, *supra* (total prohibition of sale of bird parts lawfully obtained prior to the effective date of the statute); *Everard's Breweries v. Day*, 265 U.S.

545 (1924) (prohibition against the sale of liquors manufactured before passage of the statute). Such police power regulation has not been regarded as a compensable taking of property or as a violation of due process giving rise to a claim for damages.

The reasons why economic regulation under the police power does not give rise to claims for compensation are clear. At least since the time of Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and as recently as the dissenting opinion of Justice Brennan in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 at 650 (1981), the Court has explicitly recognized the general proposition that "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. See also, *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 124.

Furthermore, if regulation gave rise to a right of compensation for diminution in value, government would often be compelled to regulate by purchase, rather than by rule, though it has neither the desire nor the funds for purchase. The matter was recently discussed in *Andrus v. Allard*:

Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Andrus v. Allard*, *supra*, 444 U.S. at 65 (emphasis added).

Finally, courts have been reluctant to predict the future profits whose loss due to regulation causes diminu-

tion in the value of property. As the Court said in *Andrus v. Allard*, *supra*, 444 U.S. at 66, "Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."

Thus this Court has rejected as "quite simply untenable" the notion that parties can obtain a right to compensation by showing that a "substantial restriction" has been imposed which "denie[s] the ability to exploit a property interest that they heretofore had believed was available for development . . ." *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 128-129, 130. In the field of land use planning the Court has permitted precisely such restrictions because, in the judgment of local officials, they protect against ill effects arising from urbanization, enhance the quality of life in a municipality and the aesthetic character of the municipality, prevent the unnecessary conversion of open space land, and offer reciprocal benefits to all who are affected by them.⁷ *Agins v. City of Tiburon*, 447 U.S. 255

⁷ In a salient passage from *Suess Builders Co. v. Beaverton*, 294 Or. 254, 656 P.2d 306, 309 (1982), Justice Hans Linde of the Oregon Supreme Court pointed out that an exercise of the police power, including a regulation affecting land, does not give rise to a right of compensation. Rather, "Business invests with knowledge of such governmental power to make laws for its conduct. . . ." Justice Linde said:

A newly adopted health or environmental regulation may forbid the use of a fuel or the production of certain wastes and thereby cause the closure of a large plant. A tightened safety standard may devastate an investment in expensive machinery or product inventory. New building codes or other rules concerning fire safety or access for handicapped persons may make it uneconomic to maintain a hotel or residential building, with consequent financial loss. Business invests with knowledge of such governmental power to make laws for its conduct, and the balancing of regulatory goals against their economic consequences is the daily stuff of politics rather than of litigation

(1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

B. Though as a general rule exercises of government's regulatory power do not create claims for compensation, *amici* recognize the possibility that there could be egregious circumstances in which such claims might arise.⁸ However, such exceptions to the general rule must be carefully circumscribed lest they cause the serious adverse consequences described earlier in this brief; i.e., lest they create monumental liability for government at all levels, paralyze government's ability to make regulatory changes for the public welfare,⁹ vitiate the process of staged regulation and development, swamp the courts with lawsuits by businessmen seeking to recoup real or

for "just compensation." See *Anthony v. Veatch*, 189 Or. 462, 494, 220 P.2d 493 (1950) (prohibition of "fixed gear" fishing); *City of Portland v. Meyer*, 32 Or. 371, 52 P. 21 (1898) (prohibition of slaughter house). Regulation in pursuit of a public policy is not equivalent to taking for a public use, even if the regulated property is land. (Footnotes omitted).

⁸ Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*, *supra*, seems to be premised in significant part on rejection of the idea that regulation can never give rise to a taking. Thus after stating the question of the case, Justice Brennan said "Implicit in this question is the corollary issue whether a government entity's exercise of its regulatory police power can ever effect a 'taking' within the meaning of the Just Compensation Clause." 450 U.S. at 646-647 (emphasis added). Justice Brennan further pointed out that "the California courts have held that a city's exercise of its police power, however arbitrary or excessive, cannot . . . constitute a 'taking'". *Id.* at 647 (emphasis added). Finally, he also said the Court has "rejected the proposition that police power restrictions could never be recognized as a Fifth Amendment taking." *Id.* at 650 (emphasis added).

⁹ A major recent example of such changes is the enactment of laws and regulations designed to eradicate discrimination by race, religion, sex or age.

alleged losses, force government to regulate by purchase rather than by rule, and enmesh the courts wholesale in speculative predictions of profitability.¹⁰ Thus, the cases in which there could be an exception to the general rule must be confined to ones in which government is not acting in good faith pursuit of legitimate state interests, but is instead taking bad faith actions designed to harm a party. See *Agins v. City of Tiburon*, *supra*, 447 U.S. at 260 (a taking may arise if an "ordinance does not substantially advance legitimate state interests"), 263 n.9 ("The State Supreme Court correctly rejected the contention that the municipality's good-faith planning activities, which did not result in successful prosecution of an eminent domain claim, so burdened the appellants' enjoyment of their property as to constitute a taking.")

Moreover, entirely aside from whether there can be a taking in the absence of bad faith, in determining whether regulatory action gives rise to a claim for compensation, it is also necessary to consider basic jurisprudential principles which are central to whether a party can assert a valid claim. Three such principles are preeminent.

First, absent extraordinary delay, the passage of time during the process of governmental decisionmaking cannot give rise to a claim for compensation. Governmental decisionmaking is the essence of regulation, and it necessarily requires sufficient time to proceed. Even if property declines in value while decisionmaking is in progress, absent extraordinary delay this will not create a taking, or a claim for damages, lest the power of regulation be thwarted. That no claim arises from a decline in value during the decisionmaking process has been made explicit in *Agins v. City of Tiburon*, *supra*, 447 U.S. at 263 n.9:

¹⁰ Freilich, Robert H., *Solving the 'Taking' Equation: Making the Whole Equal the Sum of Its Parts*, 15 URBAN LAWYER 447, 552-553 (1983).

Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

Second, for there to be a compensable taking, a regulation must "den[y] an owner economically viable use of his land . . ." *Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc.*, 452 U.S. 264, 295-96 (1981), quoting *Agins v. City of Tiburon*, *supra*, 447 U.S. at 260. As indicated earlier, a taking does not arise simply because the value of property is lessened, and public interest regulations greatly diminishing the value of property have been upheld. Not mere lessening of value, but preclusion of all viable economic worth, is the sine qua non of compensability.

It is therefore clear that there can be no compensable taking if property has *increased* in value during a period of governmental decisionmaking. As well, a loss of interest or rental value during this period cannot in itself constitute a taking. Such loss merely lessens, but does not preclude, economic value, and it may indeed be offset by a rise in value due to changed market conditions.

Moreover, in determining whether there has been a total loss of value, it is necessary to consider a parcel or project as a whole. "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 130. Were the rule otherwise, a party with a large overall profit could secure compensation because a small portion of his project lost value due to regulation furthering the public welfare.

Third, a party claiming compensable loss must be able to show, under normal rules of causation, that his loss

arose because of governmental regulation. If the loss is attributable to other causes, the government cannot be made to pay. Otherwise the government will become an insurer, or guarantor, of profit. That would clearly be impermissible.

IV. Under Governing Legal Principles, the Decision Below Must Be Reversed, or the Case Must Be Remanded for Development of Additional Pertinent Facts

We turn now to an assessment of whether, under governing legal principles, the facts of this case give rise to a claim for compensation or damages. As indicated above, *amici* believe enough facts are known to require reversal. But they would candidly say that, because a number of relevant facts seem to be either absent or murky, the Court might desire to remand for development of a fuller record before determining the crucial constitutional issue at stake here.

We first discuss facts and reasons warranting outright reversal of the lower court's ruling that there was a compensable taking:

A. To begin with, a claim of compensable taking appears unfounded because there seems to be no bad faith pursuit of illegitimate objectives by any governmental agency or official. Indeed, as the trial court said, the jury found that "the members of the Planning Commission and other named defendants had acted reasonably and in good faith." Memorandum Opinion of Judge John T. Nixon, D.C.M.D. Tenn., reprinted in Appendix to Petition for Writ of Certiorari, at 24a.

In this connection, changes in the zoning laws and regulations in 1977 and 1979 appear to have been reasonable and appropriate exercises of the power to regulate land use. Such changes (1) required that when calculating the number of houses allowable on the total acreage, ten percent of the acreage must be subtracted as attribu-

table to roads and utilities; (2) required that an acre be calculated as 43,560 square feet—a true acre—instead of 40,000 square feet; (3) increased minimum lot sizes from 9,000 square feet to half an acre; and (4) increased minimum lot widths from 75 feet to 125 feet. All such changes are clearly within the regulatory power.

Respondent did claim below, however, that the reason it was unable to build all the houses it wished was that a new county executive took office, with a different view toward the desirability of intensive development. However, even if the new executive had a less favorable view of development, such an attitude is not illegitimate or a sign of bad faith—and the jury found no bad faith. Opposition to intensive growth is a wholly permissible position for governmental officials to hold and is perfectly appropriate for implementation through the police power. Moreover, as nearly as *amici* can determine from the record, respondent's desire to build more units was blocked, not by governmental attitudes, but by respondent's failure to meet permissible criteria such as density and slope requirements.

B. Another reason why there is no compensable taking is that respondent seeks remuneration for delay occurring because plats it submitted in 1980 and 1981 failed of approval. However, as made clear in *Agins v. City of Tiburon*, *supra*, unless it is extraordinary, delay incident to the regulatory process creates no claim for compensation. Rather, such passage of time is an inevitable incident of the ownership of property, since the regulatory process requires time to proceed.

In this case, the local planning commission appears to have acted promptly, and there is no suggestion of extraordinary delay. This in itself defeats respondent's claim for compensation.

Moreover, not only was the regulatory process prompt, but it actually was far shorter than it permissibly could

have been. For respondent chose not to exercise its right to seek an administrative variance, which would have lengthened the regulatory process, and instead filed a lawsuit. Most of the delay of which respondent complains occurred during the period of the suit, and is therefore attributable not to slothful regulators but to respondent's own decision.¹¹

C. Another reason that a claim of taking appears unfounded is that there was no change in the density and slope requirements which appear to have been the real barriers to respondent's desire to build more houses. The density requirement of no more than one house per acre existed in 1973 and remained in place, and the same is true of the requirement that no house be built on a lot having a slope greater than twenty-five percent. Because these requirements, which seem to have been the truly insurmountable obstacles confronting respondent, had undergone no alteration over the years, respondent cannot validly claim a taking arose from regulatory changes.¹²

D. Respondent claims a right to build a total of 736 houses because the sketch plat initially submitted by the developer, which was approved in 1973 and reapproved

¹¹ Respondent's failure to exhaust its administrative remedies by seeking a variance is another reason why it has no claim for compensation. An attempt to secure a variance could have enabled respondent to obtain prompt approval for its plats and thereby obviated the delay of which it complains. (We note that, when respondent sought a variance in 1983, one was expeditiously approved.) Moreover, absent extraordinary delay, there can be no compensable taking until the regulatory process has made a decision with finality. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982). There was no such decision in the absence of an attempt to receive, and a rejection of, a variance.

¹² The failure to meet the density requirement was not due to the change in the definition of an acre, which was expanded from 40,000 feet to 43,560 feet.

afterwards, stated that this was the allowable number of dwelling units. But as discussed earlier, the land use planning process occurs in stages. An initial sketch plat is far less detailed than later plats, and each plat must receive separate approval. A later plat may fail of approval, though the earlier one gained it, because the added information on the later plat shows that the developer's initial plans cannot be carried out in conformity with the law.

That indeed appears to have been the case here. The initial sketch plat which was approved and reapproved lacked information on the topography of the land. When such information became available in connection with later plats, it showed that the desired number of houses could not be built without extensive violations of the county's slope requirements. The later plats were therefore properly disapproved.

E. Not only were the later plats properly disapproved, but the initial sketch plat itself carried notations showing that substantial portions of the land were not to be developed until approved by the planning commission. For this reason, too, respondent cannot validly assert that approval of the initial sketch plat created a right to build a total of 736 houses, the total which would have been reached under respondent's later plats.¹³

F. Though respondent relies on the initial sketch plat as creating a right to build 736 houses, the assumptions of that plat were not fulfilled. Thus 18½ acres of land, which could have been used for numerous dwellings, were instead taken by the state for use as a highway.

¹³ We note that, though respondent relies on the initial 1973 approval, Williamson County subdivision regulations in effect in 1973 specifically stated that "approval of the preliminary plat by the planning commission will not constitute acceptance of the final plat. . . ." Williamson County, Tenn. Subdivision Regulations, 1959; Article II § B4, at A-872.

Similarly, a 245-acre golf course that was supposed to be devoted to residents of the project became a country club to which residents did not necessarily belong. The change in the golf course constituted a failure to provide one of the promised benefits which had caused the planning commission to allow the developer the advantages of a cluster planned development.

Amici now discuss reasons indicating the case should be remanded because of pertinent but absent facts:

A. As indicated earlier, because there can be no compensable taking unless an owner has been denied all economically viable use of his land, no right to compensation or damages will arise if a project has made a profit. In the present case, however, it is unknown whether the project has or will make a profit. Indeed, the record apparently does not even show the precise amount of investment in the project, let alone the profit or loss on it.

In this regard, the only known facts are that 212 houses and the 245 acre golf course have been built and sold, county officials state that another 300 houses can be built on the remainder of the property without violating land use regulations, 18½ acres were sold to the state, the developer went through bankruptcy, and, though it does not seem to be in the record, the respondent bank apparently has received approval for a new plat and has already sold a part of the remainder of the property to a new developer.

Under these facts, it is perfectly possible that the project as a whole may show a profit when all the houses are built and sold. Indeed, it is also possible that the respondent bank *itself* may make a profit because of sales of the remainder of the property.

Because the project as a whole may prove profitable, it cannot presently be said that there has been a compensable loss. Moreover, even if it could be established

that there will be an overall loss, the respondent bank would not be the proper party to receive compensation for that loss if it will itself make a profit. Nor would it be a proper party to receive compensation for the entire loss if it will suffer only part of the loss.

In the courts below, however, respondent claimed that it should obtain compensation for loss on the remainder of the land, divorced from the project as a whole, and that such compensation is measured by the interest respondent failed to earn because of delay in the project. These claims are erroneous.

As the Court has made clear, a project cannot be carved into separate segments in determining whether there has been a compensable taking due to alleged denial of economic use.¹⁴ Rather the project must be looked at in its entirety, lest compensation for loss erroneously be awarded where there is extensive economic use and a profit.¹⁵ This principle is especially applicable to cluster planned developments, where portions of land on which construction is not permitted due to slope or other problems are nevertheless integral to the project because, by remaining as open space, they allow an increased number of dwellings to be built on other portions of the land.

Thus, even assuming the unknown fact of loss on the remainder of the land, there can be no taking here, and no compensation, if the project as a whole is profitable.

¹⁴ *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978).

¹⁵ Though our discussion has focused in large part on the question of profit or loss, we do not mean to imply that there can be no viable economic use in the absence of profit. The question of viable economic use is a complex one which must take account of cash flow benefits, tax deductions and credits, and other economic and financial factors that are commonly considered when assessing the worth of businesses or investments.

Nor can compensation be measured here by alleged loss of interest due to delay, as claimed by respondent. This claimed loss did not deprive respondent of all viable economic use of its property, and, for all that appears, respondent may make a significant profit because of sales of the remainder of the land. The most that could flow from the loss of interest is a reduction in the property's value to respondent. But a mere reduction in value is not a compensable taking, as this Court has often made clear.¹⁶

B. Even if it is assumed that there will be an overall loss on the project, or that loss on the remaining portion of the land can be considered apart from the overall financial results, the record does not appear to demonstrate that these losses were caused by actions of the local government. Nor can such causation be assumed. Unproven assumption of causation is normally inappropriate in any litigation, and is further belied here by economic facts of which the Court may take judicial notice.

Housing starts declined precipitously in the Nashville area during the two years following the initial 1973 approval of the first sketch plat in this case: housing starts in the area went from 8,634 in 1973 to only 3,187 in 1975.¹⁷ Then, after rising to nearly 8,000 in 1977 and 1978, they again declined precipitously to only 3,163 in 1981. The housing market in the Nashville area thus

¹⁶ *Andrus v. Allard*, 444 U.S. 51 (1979).

¹⁷ The source of the information set forth in this brief on housing starts in the Nashville area and in the country as a whole is U.S. Bureau of the Census, *Construction Reports—Housing Units Authorized by Building Permits and Public Contracts: Annual 1973-1983*. (The Nashville SMSA was enlarged in 1978, so numbers for subsequent years were increased by approximately 23 percent. Thus the figure of 3,163 housing starts in 1981 is higher than it would have been under methods of calculation in use in 1978 and earlier.)

paralleled the housing market nationally, which went from a total of 2,045,000 housing starts in 1973 to only 1,160,000 in 1975, and which, after rebounding to approximately two million in 1977 and 1978, again dropped precipitously to only 1,084,000 in 1981 and 1,062,000 in 1982.¹⁸ Furthermore, the housing market appears to have been dramatically affected by changes in the interest rates. Compare U.S. Bureau of Census, *Statistical Abstract of the United States, supra*, Table No. 1328, New Housing Units Started: 1960 to 1983, with U.S. Bureau of the Census, *Statistical Abstract of the United States, supra*, Table No. 870, Bond Yields, Stock Yields, and Mortgage Rates: 1970 to 1982.

Thus, it would appear reasonable to believe that the cause of any overall loss suffered by this project may have been economic conditions affecting the Nashville housing market, conditions which made it difficult to sell homes and thereby forced developers to bear high carrying costs for a long period of time. Furthermore, had economic conditions not been adverse for long periods, the entire project might have been completed well before the 1980's delay for which respondent seeks compensation because of an alleged loss relating to an unfinished portion of the project. Since it seems entirely possible that economic conditions rather than government regulation was the cause of loss, to award compensation for a claimed taking would make government an insurer of profit—a result which is impermissible. Thus, unless and until it is proven that governmental regulation *was* the cause of claimed losses, it is erroneous to award compensation for them.

¹⁸ U.S. Bureau of the Census, *Statistical Abstract of the United States: 1984*, Table No. 1328 (104th ed.), Washington, D.C., 1983.

CONCLUSION

For the foregoing reasons, the Court should either reverse the decision below or remand for the development of a fuller record containing pertinent facts which presently are unknown.

Respectfully submitted,

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FILED**NOV 15 1984****ALEXANDER L. STEVAS.**
CLERK**WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al.,**
Petitioners,

VS.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**Amici Curiae Brief of State of California ex rel. John K.
Van de Kamp, Attorney General and California Coastal
Commission, the Tahoe Regional Planning Agency, the
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North Carolina, Oklahoma, South Dakota,
Utah, Vermont, Wisconsin, Wyoming,
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QUESTIONS PRESENTED

1. Where a land use regulatory measure enacted pursuant to the police power comes into conflict with property rights protected by the Fifth and Fourteenth Amendments, does a judicial decree remanding the matter to the regulatory body for appropriate corrective action constitute the appropriate remedy or does the Constitution compel forced purchase?

2. Can a taking be demonstrated a) by examining a portion of a unified land development project in isolation from the overall development; and b) based solely on showing that the developer may be unable to realize a profit on each phase of the development, without reference to the developer's reasonable, investment-backed expectations concerning the project as a whole?

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No. 84-4

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al.,
Petitioners,

vs.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

**On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit**

**Amici Curiae Brief of State of California ex rel. John K.
Van de Kamp, Attorney General and California Coastal
Commission, the Tahoe Regional Planning Agency, the
States of Alaska, Florida, Iowa, Massachusetts,
Minnesota, Nebraska, Nevada, New Hampshire,
North Carolina, Oklahoma, South Dakota,
Utah, Vermont, Wisconsin, Wyoming,
and the Territory of American Samoa.**

Amici file this brief pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

INTEREST OF AMICI

This brief is respectfully submitted in support of petitioner Williamson County Regional Planning Commission.

The seventeen states and territories which have joined as amici in this case, together with their political subdivisions, exercise regulatory power over the proposed use of land and water resources within their respective jurisdictions. Amici are charged with the delicate responsibility of balancing demands for growth and development against the need to preserve finite natural resources located within their borders. The nature of affected resources runs the gamut from shoreline areas to urban communities, coastal wetlands to rural farmlands. Proposed development projects that amici review on a regular basis are similarly multifaceted: residential subdivisions, commercial centers, recreational developments and coal mining projects are but a partial list. The power of state, regional and local governments to control untoward development in light of resource and population constraints has been recognized for generations. (*Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).)

In recent years, the need for amici to evolve planning mechanisms to meet increased population pressures has become apparent. California's experience with Lake Tahoe is illustrative. The Tahoe Regional Planning Agency was created by California and Nevada and approved by Congress following a general consensus that traditional land use planning measures were inadequate to preserve the unique Lake Tahoe Basin in the face of rapid growth. The Agency, created in 1969 and modified in 1980 by interstate compact (P.L. 91-148, 83 Stat. 360, amended by P.L. 96-551, 94 Stat. 3233.), is directed to adopt and administer a regional plan which allows limited development while recognizing and preserving Lake Tahoe's exceptional qualities.

T.R.P.A.'s actions to promote the protection of natural resources have resulted in substantial litigation. Land-owners have repeatedly charged that the effect is to have inversely condemned their properties. (See, e.g., *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).)

This agency has, in recent years, been engaged in inverse condemnation litigation in which the monetary claims aggregate many millions of dollars. The ability of T.R.P.A. to accomplish the mandates of Congress and amici States of California and Nevada would be severely harmed if damages are found to be an available remedy in such cases.

This experience is by no means unique to amici T.R.P.A. and the State of California. Other amici joining in this brief administer similar programs and confront related litigation on a continuing basis. The issues in this case are thus of critical importance to them, and amici therefore respectfully request that their contentions be considered in this case.

SUMMARY OF ARGUMENT

1. Traditionally, federal and state courts confronted with a regulatory measure that results in an unconstitutional taking of property have found equitable relief rather than damages to be the appropriate remedy. Consistent with precedent, amici submit that where such a regulatory taking exists, the preferable course is to remand the matter to the affected administrative or legislative body for corrective action under the continuing supervision of the trial court. This remedy properly leaves to the agency the decision to choose between acquisition of the property through exercise of the condemnation power, invalidation of the offending measure or other effective corrective action.

Compelled payment of damages in such cases, on the other hand, would have several unfortunate consequences. First, damages are not nearly as efficient a remedy as judicial remand. Second, imposition of the former remedy would raise serious separation of powers questions by forcing the judiciary to make de facto planning and budgetary decisions that have traditionally been left to other branches of government. Third, requiring money damages in the case of a regulatory taking carries the risk of fiscal chaos for state and local governments. Finally, such a holding would have a major chilling effect on the land use planning process, stifling attempts to fashion planning techniques made necessary by changing social circumstances.

Nor are damages required to cure a "temporary" taking. Judicial remand to the governmental entity involved, coupled with careful oversight and utilization by the courts of traditional sanctions when necessary, is equally effective and far less disruptive of the regulatory process.

2. No taking of respondent's property has been demonstrated in this case for two distinct reasons. First, in determining whether a taking had occurred, the Sixth Circuit inappropriately considered only a portion of the entire development rather than examining the uses which had already been allowed for the development as a whole. Second, the Sixth Circuit inappropriately determined that a taking had occurred based on nothing more than a determination that the developer would not make a profit on the segment of the development under examination. Nothing in the Constitution requires that developers be assured a profit on each parcel of property they acquire.

ARGUMENT

I

IF A REGULATORY MEASURE IS FOUND TO CONSTITUTE A TAKING OF PROPERTY BECAUSE OF ITS EFFECT ON A PARTICULAR PROPERTY OWNER, THE APPROPRIATE REMEDY IS TO REMAND THE MATTER TO THE GOVERNMENTAL ENTITY FOR APPROPRIATE CORRECTIVE ACTION; JUDICIALLY FORCED PURCHASE OF THE PROPERTY IS NEITHER MANDATED NOR WARRANTED

Amici submit that the record in this case, when applied to the standards created by the Court, compels the conclusion that no unconstitutional taking of respondent's property occurred as a result of petitioner's actions. (See part II, below.) Yet even if an unlawful taking was assumed to exist, established precedent and important considerations of public policy dictate that compelled payment of money damages is an inappropriate remedy.

A. The Court's Prior Decisions Do Not Support the Assertion That a Monetary Remedy Is Compelled for a Regulatory Action Which Constitutes a Taking

The theory that a land use regulatory measure might result in a constitutionally compelled award of damages is of recent origin:

"During the first part of this century, courts had called harsh regulations takings, and, since no compensation had been offered, the courts invalidated them. It hardly occurred to anyone that if the regulation was a taking, then a possible remedy was for the property owner to sue in inverse condemnation. . . . "Until the 1970s, no reported case recognizing inverse condemnation for mere regulation could have been cited." (Hagman and Misczynski, *Windfalls for Wipe-outs: Land Value Capture and Compensation* (1978) 256, 272.)

Indeed, Professors Hagman and Misczynski assert that the concept of compensable regulation was never even raised until 1953. (*Id.* at 256.)

In fact, several notable property law experts, in a comprehensive historical analysis of the taking clause, concluded that the clause was never intended to apply to regulation of land at all, and that it derived only

"from the English nobles' fear of the King's seizures of land for his own use . . . But the use of land was being regulated—often very severely regulated—throughout English and early American history. Only around the turn of the Twentieth Century did judges and legal scholars popularize the notion that if regulation of the use of land became excessive, it could amount to the equivalent of a taking." (Bosselman, Callies and Banta, *The Taking Issue* (1973) 319.¹)

Even those scholars who seemingly concur in the views expressed in the dissent of Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 636-661 (1981), acknowledge that the concept of a compelled damages remedy represents a departure from established law. (See, e.g., Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings"*, 8 Hastings Const. L.Q. 517 (1981): "The traditional recourse of landowners and land developers whose plans for profitable development of land are blocked by restrictive zoning or other land use regulations is a suit to invalidate the regulations on constitutional grounds.")

¹The exact motivation for the adoption of the taking clause may never be ascertained, but at least one thing is clear; the draftsmen were not troubled by any issue involving regulation of the use of land. Such regulations had been standard practice in England and throughout colonial times and seem to have provoked no serious controversy. There is no evidence that the founding fathers ever conceived that the taking clause could establish any sort of restrictions on the power to regulate the use of land." (*Id.* at 104.)

The conclusions of these scholars are buttressed by legal precedent. Reviewing applicable case law, the First Circuit observed in 1980:

"The remedy awarded in such cases . . . has not been the awarding of the value of the diminished property right, but a declaration of the invalidity of the purported exercise of the police power. [Citations omitted.] Our research has disclosed no case in which a federal court has ordered a state or local government unit to pay for a diminution of the value of a piece of property caused by a zoning regulation." (*Pamel Corp. v. Puerto Rico Highway Authority*, 621 F.2d 33, 35 (1st Cir. 1980).)

Traditionally, state courts have similarly rejected damages as remedy in regulatory takings cases in favor of invalidation or related equitable remedies.²

Thus, respondent's claim that "this Court has also recognized that . . . a temporary deprivation of property can constitute a taking for which damages are an appropriate remedy" in land use cases (Respondent's Brief in Opposi-

²A partial list of pertinent state court decisions includes *Davis v. Pima County*, 121 Ariz. 343, 590 P.2d 459 (1978) cert. denied 442 U.S. 942 (1979); *Gold Run, Ltd. v. Board of County Comm'rs*, 38 Colo. App. 44, 554 P.2d 317 (1976); *Mailman Dev. Corp. v. City of Hollywood*, 286 So. 2d 614 (Fla. App. 1974); *Holaway v. City of Pipestone*, 269 N.W.2d 28 (Minn. 1978); *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S. 2d 5, (1976), appeal dismissed, 429 U.S. 990 (1977); *Eck v. City of Bismark*, 283 N.W.2d 193 (N.D. 1979); *Fifth Ave. Corp. v. Washington County*, 282 Or. 591, 581 P.2d 50 (1978); *Gaeble v. Thornbury Township*, 8 Pa. Commw. 379, 303 A.2d 57 (1973); *Allen v. City & County of Honolulu*, 58 Ha. 432, 571 P.2d 328 (1977); *McShane v. City of Fairbault*, 292 N.W.2d 253 (Minn. 1980); *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372 (1979), aff'd. on other grds, 447 U.S. 255 (1980); *DeMello v. Town of Plainville*, 170 Conn. 675, 368 A.2d 71 (1976); *Trustee Under Will, etc. v. Town of Westlake*, 357 So.2d 1299 (La. 1978).

tion to Petition at 5) is fiction. The Court observed in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 166 n.12 (1958) that "Ordinarily, the remedy for arbitrary governmental action is an injunction, rather than an action for just compensation."

Respondent mistakenly relies upon past cases in which the federal courts have mandated compensation in the face of actual governmental seizure of private property. But such precedents simply reflect the rule that the United States and individual states may constitutionally enter into physical possession of property without first filing condemnation proceeding, and instead may take the property and require the owner to himself institute proceedings for compensation. (*United States v. Dow*, 357 U.S. 17, 21 (1958).) A corollary principle is that physical invasions of private property rights (so-called "physical invasion" cases) may trigger a requirement for compensation. (*United States v. Lynah*, 188 U.S. 445 (1903) (permanent flooding of plaintiff's land); *United States v. Causby*, 328 U.S. 256 (1946) (airplane overflights).) Where such action occurs, limiting the remedy to an award of damages may well be proper. The sometimes permanent nature of such takings accounts for the court's historical reluctance to utilize injunctive relief when to do so might frustrate legitimate government functions. (See, e.g., *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932).)

Precisely the opposite considerations obtain in the case of alleged takings resulting solely from applications of the government's police powers (so-called "regulatory takings"). Such acts are neither permanent nor irreversible. This Court has previously recognized that the distinction between "physical invasion" and "regulatory" takings is one of kind rather than degree. (See *Penn Central Transportation Co. v. New York City*, *supra*, 438 U.S. 104, 124; *United States v. Clarke*, 445 U.S. 253, 257-258 (1980).) This critical difference accounts for the traditional judi-

cial preference for equitable remedies in the case of "regulatory takings," and damages in "physical invasion" cases.

B. Remanding a Regulatory Measure Which Constitutes a Taking of Property Is an Effective and Appropriate Remedy

Amici suggest that it is inappropriate for this Court to mandate payment of damages under a theory of inverse condemnation in cases involving takings arising out of regulatory conduct. The preferable rule following a finding of a taking is instead to remand the case to permit the agency and legislative body to make an informed decision as to whether to repeal the offending measure, acquire the parcel or take other sufficient corrective action.

This rule respects longstanding federal and state court precedents while avoiding the imposition of forced purchase on an agency that often lacks the requisite power, funds or desire to acquire property that has been "taken." The Court should instead afford respondent a reasonable opportunity to cure the taking. In particular cases, purchase may ultimately be the optimum solution; in others, rescission or modification of the offending measure is appropriate. A blanket rule imposing damages as the exclusive remedy, however, would be inflexible and ultimately counterproductive. (See part I(C), below). The central point is that choice of the appropriate remedy should be left in the first instance to the governmental agency, to be made on the basis of informed decision-making.

The trial court, having initially found a taking, exercises its inherent and traditional supervisory power to oversee the administrative decision-making process on remand.

³We understand that petitioner Commission does not have the power of eminent domain. Amici California Coastal Commission and Tahoe Regional Planning Agency also lack such authority.

That a court can retain continuing jurisdiction over such developments is an unquestionable element of the trial court's equitable powers.

The trial court's retention of such an oversight role, moreover, overcomes any suggestion that public agencies will simply change an invalidated regulatory measure so as to frustrate both the judicial decree of invalidation and the landowner's private property rights. Public officials, after all, are sworn to uphold constitutional rights to the best of their ability, and they therefore are not likely knowingly and voluntarily to violate that oath. Nor do they lightly risk contempt of court sanctions for subverting judicial decrees. The courts, both state and federal, have sufficient enforcement powers to ensure that their orders are observed, including the ultimate power to mandate specific actions, if good faith responses are not forthcoming. There are thus numerous means, other than the drastic remedy sought here, to provide relief for improper governmental responses after a decree striking down a regulatory measure.

How this rule can and should be applied is illustrated by the California Supreme Court's recent decision in *Furey v. City of Sacramento*, 24 Cal.3d 862, 157 Cal.Rptr. 684 (1979), cert. denied 444 U.S. 976 (1979). There the court held that allegations that a city encouraged installation of public improvements with private funds, if proven, could constitute a taking where subsequent municipal zoning rendered those improvements worthless. The court, however, rejected an award of damages premised on a theory of inverse condemnation. It instead found it appropriate to remand the proceedings to the local governmental entities to afford them "a reasonable opportunity to make use of the reassessment procedures. . . or to take other appropriate action directed toward ameliorating in equitable fashion the gross inequities which here appear."

(24 Cal.3d at 878, 157 Cal. Rptr. at 693⁴); see also *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W. 2d 475, 480-489 (1979) (requiring remand for administrative corrective action following judicial finding of a taking); cf. *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1200-1201 (5th Cir. 1981), cert. denied 455 U.S. 907 (1982).

Numerous legal commentators have agreed that judicial remand to the public agency is a remedy far preferably to mandated imposition of a damage award.⁵

⁴In his *San Diego Gas & Electric* dissent, Justice Brennan characterizes California law as standing for the proposition that "[n]o set of factual circumstances, no matter how severe, can 'transmute' an arbitrary exercise of the city's police power into a Fifth Amendment 'taking.'" (450 U.S. at 642-643.) With all due respect, this perception is incorrect, as evidenced by the *Furey* decision. California courts have found takings to have occurred in a variety of factual contexts, with damages warranted in appropriate circumstances. (See, e.g., *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 516 n.14, 125 Cal.Rptr. 365, 371 n.14 (1975); *Toso v. City of Santa Barbara*, 101 Cal.App.3d 934, 162 Cal.Rptr. 210 (1980); *Jones v. People ex rel. Dept. of Transportation*, 22 Cal.3d 144, 148 Cal.Rptr. 640 (1978); *Liberty v. California Coastal Commission*, 113 Cal.App.3d 491, 500-504, 170 Cal.Rptr. 247, 252-255 (1980).) What California law does provide is that the right to pursue judicial relief for an unconstitutional taking does not carry with it an unfettered right to a particular remedy. (*San Diego Land & Town Co. v. Neale*, 78 Cal. 80, 82, 20 P. 380, 381 (1888).)

⁵There have been innumerable law review articles written on this subject. See e.g., Mandelker, *Land Use Takings, The Compensation Issue*, 8 Hastings Const. L.Q. 491, 504-512 (1981); Comment, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stanford L.R. 1439 (1974); Girard, *Agins: A Step in the Right Direction*, Land Use L. & Zoning Dig. (September 1979); Magavern, *The Evolution and Extension of the New York Law of Inverse Condemnation*, 24 Buff. L. Rev. 273 (1975); Clark and Kidman, *The Relationships of Just Compensation to the Land Use Regulatory Power*, 2 Pepperdine L. Rev. (1975); Beuscher, *Land Use Controls: Cases and Materials*, 1d ed. 1964) at 538-50; Wright, *Exclusionary Land Use Controls and the Taking Issue*, 8 Hastings Const. L.Q. 545, 578-583 (1981).

C. A Compelled Damages Remedy for a Regulatory Action Which Constitutes a Taking Contravenes Several Important Public Policies Warranting a More Flexible Approach

Numerous important considerations of public policy underlie the longstanding rule that judicially imposed damages are inappropriate in a case involving a regulatory taking. Several of the most important are summarized below.

1. Damages Are an Inefficient Remedy in Most Cases Involving a Taking Arising Out of Regulatory Conduct

Where application of regulatory measures have been found to effect a taking, it is incumbent upon the court to fashion the optimum remedy. Implicit is the duty to determine what type of relief is required to correct the wrong and how the court can most efficiently provide it.

The rule urged by respondent is of a most radical nature. In effect, it would tell a governmental entity that when the latter acted in a specific regulatory role, albeit improperly, it triggered compulsory acquisition of a fee or lesser interest in the land involved. "When you zoned it, you bought it" (or at least some interest in it). This would be true no matter how unintended the result or how disastrous the impact on the public treasury.

However, the mandatory damages remedy urged by respondent is short-sighted and ultimately counterproductive. In the case of a successful takings action brought against an agency that has impermissibly denied a development permit, for example, the aggrieved landowner could be awarded damages in lieu of the right to further pursue development options. Leaving aside the often illusory benefits government would obtain thereby, the interests of various third parties are ignored. The proposed project developer, if other than the landowner, would obtain no

benefit whatsoever from a damages remedy. Nor would surrounding landowners who may (or may not) stand to benefit from future development. Similarly overlooked are other potential beneficiaries of development, such as prospective residential or commercial tenants.

The corollary issue of valuation is also ignored by respondent's argument. In the event of direct or inverse condemnation warranting damages, government is presumably required to pay only for the property interest it received, not for the opportunity value lost to the property owner. (*United States v. Powelson*, 319 U.S. 266, 284 (1943).)

Damages may, of course, turn out to be the preferable remedy in a given case. *Compelled* payment of damages, however, does not represent the optimum course in all or even most takings litigation.

2. A Compelled Monetary Remedy for a Regulatory Action Which Constitutes a Taking Is Inappropriate and Would Effectively Transfer the Power of Eminent Domain from Legislatures to the Judiciary, And Is Therefore Inconsistent With the Separation of Powers Doctrine

The power to regulate and the power of eminent domain are two distinct powers of government. (See, e.g., *Fred F. French Invest. Co. v. City of New York*, 39 N.Y.2d 58, 350 N.E.2d 381, 384-385, 385 N.Y. Supp.2d 5, 8-9 (1976), app. diss. 429 U.S. 990 (1977).) The fact that the former may be limited by the same constitutional clause which limits the latter does not mean that the latter has been exercised when that limit is reached. Where the legislature has not chosen to exercise its eminent domain power, the courts should not compel its use as a damage remedy. This result simply recognizes the proper constitutional role of the legislative branch of government in determining when that legislative power should be exercised.

This distinction between agencies with the power to condemn and those which are not entrusted with such authority

also finds considerable support in the court's rationale in *NBH Land Co. v. United States*, 576 F.2d 317, 319 (Ct. Cl. 1978):

"Cases of 'inverse' takings without physical invasion or ousters are not very numerous, and when they occur . . . this court has been careful to consider the role of Congress, and the taking, if not expressly authorized or directed by Congress, at least is a natural consequence of Congressionally approved measures . . . To reach the result of those cases here, in a case when the only participation by Congress has been to reject the acquisition out of hand, would strike a blow at the power of the purse. The exclusive assignment of that power to Congress is the foundation of our liberties."

The separation of powers issue engendered by respondent's theory was further noted in *Jacobson v. Tahoe Regional Planning Agency*, 474 F.Supp. 901, 904 (D.Nev. 1979), affd. on other grds., 661 F.2d 940 (9th Cir. 1981):

"If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation, or combine regulation with compensation" (quoting Comment, *Inverse Condemnation: Its Availability In Challenging the Validity of a Zoning Ordinance*, 26 Stanford L.R. 1439, 1451 (1974).)

(See also, *Agins v. City of Tiburon*, supra, 24 Cal.3d 266, 276, 157 Cal.Rptr. 372, 377 (1979).)

Thus, the courts have repeatedly emphasized that the legislature is the appropriate branch of government for a

determination of whether the condemnation power will be exercised and public funds expended.*

Some state legislatures have explicitly provided for such a determination in the regulatory measure itself. The Delaware Wetlands Statute (7 Delaware Code, Chapter 66), for example, provides that "if the Superior Court finds that the action appealed from constitutes a taking without just compensation, it shall invalidate the order and grant appropriate relief . . ." The effect of such an order is, however, stayed by statute for a period during which the Secretary of Natural Resources and Environmental Control may determine whether to invalidate his action or to initiate condemnation proceedings to acquire the fee or any lesser interest. A similar provision is provided in the Delaware Coastal Zone Act (7 Delaware Code, Chapter 70.) Other states have similar provisions. (E.g., Florida Land and Water Management Act, Fla. Stat. Anno. (West) §§ 380.085 (3), modeled on § 9-112 of the American Law Institute's Model Land Development Code (1976); Mass. Gen. Laws C. 131, § 40A, and C. 130, § 105.)

In summary, it is indisputably the court's obligation to determine whether a regulatory measure effects a taking in a particular case. But the weighing of costs and benefits leading to the decision whether compensation should be paid is properly left to the legislature rather than the courts.

*California law, for example, provides detailed limitations and procedures for exercise of the eminent domain power. Under California law, state and municipal governments do not have the power of eminent domain unless authorized by statute, and they must adhere to the procedures established by statute. See generally Calif. Code of Civil Procedure §§ 1230.010 et seq.; see also *City of Beaumont v. Beaumont Irrigation District*, 63 Cal.2d 291, 48 Cal.Rptr. 465 (1965); *People v. Superior Court*, 10 Cal.2d 288, 73 P.2d 1221 (1937).

3. Adoption of the Rule Suggested by Respondent Would Result in Major Additional Fiscal Problems for State and Local Government

Closely related to the separation of powers concerns discussed above is the fact that the rule urged by respondent could undermine the fiscal well-being of state and local governments.

Since agencies such as petitioner and amicus Tahoe Regional Planning Agency have not been granted the power of eminent domain, it goes without saying that no funds have been appropriated to purchase property on their behalf or even to pay damages for temporary restrictions. State legislatures simply did not intend for petitioner Commission and similar planning bodies to commit public funds for the purchase of private property.

Judicially-compelled damages in this context could have major adverse fiscal consequences. With the advent of severe tax reduction measures across the nation, state and local governments are being asked to meet increasing demands with a stable or even declining revenue base.

Federal courts have recognized the adverse consequences of imposing upon the judiciary the de facto task of allocating public funds. "Federal enforcement of the inverse condemnation remedy would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy." (*Pamel Corp. v. Puerto Rico Highway Authority*, *supra*, 621 F.2d 33, 36; see also *Jacobson v.*

*The power of federal courts to impose money damages against state and regional governments is further circumscribed under the Eleventh Amendment (*Pennhurst State School & Hospital v. Halderman*, . . . U.S. . . ., 79 L.Ed.2d 67 (1984); *Citadel Corp. v. Puerto Rico Highway Authority*, 695 F.2d 31, 33n.4 (1st Cir. 1982)) and the abstention doctrine. (*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *C-Y Development Co. v. City of Redlands*, 703 F.2d 375 (9th Cir. 1983).

Tahoe Regional Planning Agency, supra, 474 F.Supp. 901, 903: "TRPA does not have the power under the interstate compact to levy and collect revenue . . . A damage remedy may frustrate the budgeting of public funds"; *Agins v. City of Tiburon, supra*, 24 Cal.3d 266, 276, 157 Cal.Rptr. 372, 377.)

Respondent's position, if upheld, would significantly reduce if not emasculate legislative control over the proper allocation of often limited financial resources. For example, we are advised that the \$350,000 awarded in damages against petitioner far exceeds the Commission's annual budget. Monetary judgments in such cases could well destroy state and local government's ability to provide other necessary public services. (Cf. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976).)*

The availability of damages in cases such as the instant litigation would spell fiscal disaster for state and local governments charged with administering extensive and complex land use programs. The Court should not impose such a rule, particularly where less burdensome and equally effective remedies are available.

*Petitioner's situation is by no means unique. Amicus Tahoe Regional Planning Agency, for example, has recently been sued by landowners in the Lake Tahoe Basin as a result of its adoption of a revised regional plan. Plaintiffs—who assert no bad faith or malicious conduct on the part of T.R.P.A.—seek damages that aggregate over \$26 million. (*Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, E.D.Cal. Case No. CIV-S-84-0816-EJG; *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, D.Nev. Case No. CV-R-84-257-ECR.) These claims, if successful, would no doubt bankrupt the agency, which lacks insurance and depends on voluntary appropriations by amici States of Nevada and California for its major source of funding. The potential adverse consequences to the public as well as the Lake Tahoe environment are obvious.

4. The Compelled Payment of Damages as the Remedy in Land Use Cases Will Have a Chilling Effect on the Exercise of Necessary Governmental Functions

Last but certainly not least, the award of damages against land use planning entities is likely to have a major chilling effect upon this essential governmental function. Especially given the limited budgets of most such regulatory bodies, only the bravest official will venture more than the mildest, and most ineffectual, form of land use controls. As one commentator observed in reviewing the *Agins* case:

"The upholding of *Agins'* position would have had only the effect of making local governments or public entities very cautious in the use of police power. They would retreat to the safety of proven regulations sanctioned by *stare decisis*. If this had been the meaning of *Euclid* and *Nectow*, very likely no one would have proposed the planned unit development, the cluster zone, or the floating zone, and even if those efforts had received the prior blessing of developers, it is highly unlikely that environmental concerns or regulation of coastal and inland waterways would ever have been risked.

"The price that *Agins* urged and California rejected is too high to pay. To condone the concept of inverse condemnation in this area of the law is to deny the very first of the maxims of equity, which recognizes that the public interest must be the first concern of the law." Wright, *Exclusionary Land Use Controls and the Taking Issue*, 8 Hastings Const. L.Q. 545, 583 (1981).)

This Court has expressed the same concern. (*Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, supra*, 440 U.S. 391, 405; *Harlow v. Fitzgerald*, 457 U.S. 800, 814, 816 n.29 (1982).)

If governmental entities may exercise their regulatory powers only at the risk that they may have erred and therefore inadvertently "purchased" interests in regulated parcels, appropriate and necessary regulation of land by both traditional and modern methods will be substantially inhibited, with a predictable adverse effect on the nation's environment. As the Hawaii Supreme Court has put it:

"Monetary awards in zoning disputes would inhibit governmental experimentation in land use controls and have a detrimental effect on the community's control of the allocation of its resources." (*Allen v. City and County of Honolulu*, 571 P.2d 328, 331 (Ha. 1977).)

The New York Court of Appeals has expressed the same view:

"[T]he prospect of tort liability might impede . . . desirable governmental regulation and legislation since [governmental] officers might fear subsequent judicial imposition of massive tort recoveries. Open-ended liability could inhibit the enactment of needed, but constitutionally borderline legislation. The most salutary and effective means to curtail unconstitutional action is to stop the action before it can take effect. Indeed, the prospect of a tort action might incite potential plaintiffs to cumulate their damage and institute their constitutional claims only after significant passage of time and significant reliance upon the heretofore unchallenged validity of its action by the governmental unit involved. In the absence of legislative guidance and compelling precedent, we decline to extend tort liability for unconstitutional action to situations where government has not trespassed in some manner upon the burdened property." (*Charles v. Diamond*, 41 N.Y.2d 318, 360 N.E.2d 1295, 392 N.Y.S.2d 594, 604-605 (1977), see also *CEED v. California Coastal Zone Conservation Commission*, 43 Cal.App. 3d 306, 327, 118 Cal.Rptr.315, 330 (1974).)

This Court has consistently emphasized that a damage remedy should not be available where it would have such a chilling effect:

"Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subject to the cost and inconvenience and distraction of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." (*Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).)*

Finally, imposition of a mandatory damages remedy in regulatory takings cases could discourage state and local governments from participating in a wide variety of federal programs that depend for their effectiveness on state and local implementation. (See, e.g., Coastal Zone Management Act of 1972, 16 U.S.C. 1451 et seq.; cf. Tahoe Regional Planning Compact, P.L. 96-551, 94 Stat. 3233.)

Accordingly, the potential chilling effect on vital governmental functions is yet another reason why the decision below should be reversed.

*It is also important to emphasize the costs of litigating an action in which damages are a possible remedy, as opposed to an action in which invalidation is the result. In an action for damages after the finding of a taking, the parties must proceed to try the issue of the fair market value of the property, with all the attendant complexities and costs of an eminent domain proceeding. Moreover, even if the public agency is successful in prevailing in the appellate courts, it cannot recover its complete defense costs. The simple potential for incurring all or part of such costs, even in a successful action, is thus an additional inhibiting factor to any regulatory agency.

D. Recent Decisions of This Court Involving Constitutional Torts by Government Officials and 42 U.S.C. § 1983 Suggest Federal Deference to Available State Remedies; Land Use Regulations Is Perhaps the Classic Example of "Special Circumstances Counseling Hesitation" Where Money Damages Would Be Inappropriate

Respondent asserts that it is constitutionally entitled to a damages remedy because invalidation of zoning and planning measures found to constitute a taking would be an inadequate remedy for constitutional violations. Yet principles of federalism afford state courts broad discretion in fashioning remedies for violations of federal rights, so long as the state courts afford an adequate remedy. (See generally Hill, *Constitutional Remedies*, 60 Colum. L. Rev. 1109, 1118 (1969). This Court has interfered with the states' choice of remedy for violation of a federal right only where the sole remedy offered in the state courts is wholly inadequate, in effect denying any relief for the violation. (*Aboud v. Detroit Board of Education*, 431 U.S. 209, 237-242 and n.45 (1977); see also, *Miranda v. Arizona*, 384 U.S. 436, 467 (1966).) Indeed, this Court has specifically expressed a willingness to defer to traditional remedies afforded under state law in the face of state or local actions resulting in a taking. (*Parratt v. Taylor*, 451 U.S. 527, 537-539 (1981).)

Nor do past cases involving damage actions arising either directly under a provision of the Constitution or under 42 U.S.C. 1983 assist respondent. (E.g., *Owen v. City of Independence*, 445 U.S. 622 (1980); *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1977).) In these decisions, as well as in others involving a constitutional claim to a monetary damage remedy, the Court has consistently emphasized that there may be "special circumstances counselling hesitation" where money damages would not be appropriate. (*Bivens*, 443 U.S. at 396-397; *Owens*, 445 U.S. at 651; see

also, *Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).)

Amici respectfully submit that the factors discussed in part I(C) of this brief are "special circumstances counselling hesitation," and that a compelled damage remedy is singularly inappropriate in the case of an unconstitutional land use regulation. It is not "damages or nothing" in this case (cf. *Bivens*, 403 U.S. at 410 (J. Harlan, dissenting)); another "remedy, equally effective," exists. A federally mandated damage remedy here "would be a singularly inappropriate intrusion into the states' traditional domains of property law and land use policy," since it would, in effect, constitute a judicial exercise of the legislative power of eminent domain. (*Pamel Corp. v. Puerto Rico Highway Authority*, *supra*, 621 F.2d 33, 36; *Jacobson v. Tahoe Regional Planning Agency*, *supra*, 474 F.Supp. 901, 903-904.)

E. "Interim Damages" Are Not Required to Compensate Landowners for "Temporary" Takings. Judicial Remand to the Affected Agency, Coupled With Effective Court Oversight, Affords a Fully Sufficient Remedy

Respondent suggests that the equitable remedies which have always been available under American law to address a regulatory taking are inadequate to cure injuries attributable to a "temporary" or "partial" taking. Justice Brennan's dissent in *San Diego Gas & Electric*, *supra*, 450 U.S. 621, 636-661, affords some support for this proposition. Yet amici believe that the traditional remedy of judicial remand to the agency for appropriate corrective action, coupled with diligent, continuing court oversight, is a fully adequate remedy.

Faced with a regulatory measure perceived to be unconstitutional, a landowner bears the responsibility to secure judicial review promptly. Assuming this is done, the courts

are fully capable of resolving the controversy with dispatch.¹⁰

Assuming that a regulatory body is acting in good faith, courts have consistently held that such temporary interferences with construction projects do not give rise to a taking. Justice Powell observed for a unanimous Court in *Agins v. City of Tiburon*, *supra*, 447 U.S. 255, 263n.9, for example:

"Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'"

(See also 2 J. Sackman & P. Rohan, *Nichols' Law of Eminent Domain* § 6.13[3] (3d ed. 1979); *HFH, Ltd. v. Superior Court*, 15 Cal.3d 508, 518-520, 125 Cal.Rptr. 365, 372-74 (1975).)

The Fifth Circuit in *Hernandez v. City of Lafayette*, *supra*, 643 F.2d 1188, 1200, concluded that "a 'taking' does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity." Adopting the

¹⁰The present case provides an excellent illustration. Petitioner denied respondent's development application in June 1981. Respondent brought the instant suit two months later. Trial was held and a verdict reached in April 1982—a mere nine months subsequent. Yet respondent claimed, and the Court of Appeals agreed, that the former was entitled to \$350,000 in interim damages as the result of this short delay. And this was despite the fact that normal delays in the land development process, independent of petitioner's actions, had already consumed eight years before the application in question was denied.

remand remedy outlined in part I(B) above, the *Hernandez* court expressly rejected the notion that temporary diminutions in value could amount to a taking for which compensation is required. (*Id.* at 1201.)

Indeed, numerous federal and state court decisions have upheld the power of agencies unilaterally to impose good faith moratoria on land use development. (*Donohue Construction Co., Inc. v. Montgomery Co.*, 567 F.2d 603, 608 (4th Cir. 1977); *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm.*, 400 F.Supp. 1369, 1382-1383 (D. Md. 1975); *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381 (1925), cert. denied 273 U.S. 781 (1927).) The present case is closely analogous.

Damages are therefore unnecessary in the vast majority of cases in which temporary regulatory takings are the product of good faith, reasonable governmental attempts to administer land use programs.

Left to be considered is the rare case where malicious or wanton conduct is at work. (E.g., *San Diego Gas & Electric Co. v. City of San Diego*, *supra*, 450 U.S. 621, 655 n.22 (Brennan, J., dissenting).) Such conduct cannot and should not be condoned. Yet this Court has had little difficulty fashioning precise rules to correct intentional constitutional torts in a variety of contexts. (See, e.g., *New York Times v. Sullivan*, 376 U.S. 254 (1964); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269-270 (1981); *Harlow v. Fitzgerald*, *supra*, 457 U.S. 800, 817-819.) There is no reason to believe that it is any less able to articulate such effective and precise sanctions in the case of zoning officials who knowingly abuse their important offices.¹¹

¹¹Such is not, of course, apposite in the present litigation. The jury reached a special verdict that petitioner was acting in good faith and without malice in denying respondent's project application. (Appendix to Petition for Certiorari at 24a.)

In the vast majority of cases, however, it is indisputable that state, regional and local planning officials engage in conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (*Harlow v. Fitzgerald*, *supra*, 457 U.S. at 818.) Inadvertent regulatory excess under such circumstances can be corrected fully by remanding the matter to the administrative/legislative body for corrective action. Under the watchful eye of the reviewing court, effective relief can be secured swiftly and efficiently. (See part I(B), above.)

II

NO TAKING HAS BEEN SHOWN TO HAVE OCCURRED IN THIS CASE

While the issue of whether a monetary remedy is constitutionally required for "regulatory takings" is both interesting and very important, it need not be reached in this case, for the district court correctly found that no taking had occurred.¹²

¹²It is doubtful that the taking question raised by respondent is even ripe for judicial review, as there seems to be no evidence that respondent ever attempted to submit an application to petitioner complying with the ordinances in question. In that posture, the case lacks the "concrete controversy" described by this Court in *Agins*, *supra*, 447 U.S. 255, 260, notwithstanding testimony from respondent's appraiser about what the ordinances allowed. (See *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402, 406 (6th Cir. 1984). The rejection of a preliminary plat, apparently prepared without any effort to comply with the regulations in question, cannot be sufficient to constitute a taking, especially when it is conceded that some additional development will be allowed.

A. The Courts Below Inappropriately Chose to Consider Only the Portion of the Development Owned By Respondent, Rather Than the Integrated Project as a Whole, in Determining Whether a Taking Had Occurred

While this Court has repeatedly recognized the difficulty inherent in determining whether a taking has occurred in a particular case,¹³ the applicable precedents make it clear that no taking occurred here.

The fundamental flaw in the Sixth Circuit's analysis of the taking question is its description of the property with which it is concerned: "The property in question in this case is *the as yet underdeveloped portion of a residential subdivision*." (729 F.2d at 406.) (Emphasis added.) It is only this artificial dissection of the property by the respondent that made it possible to find that the property at issue "had no remaining significant value," (*id.*) when in fact 212 houses had already been built as part of the same development. For the court to consider only part of the development for purposes of the taking analysis was plainly incorrect.

This Court's decision in *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. 104, is dispositive. Rejecting the argument that the rights to develop the airspace above Grand Central Terminal had been taken regardless of whatever value might inhere in the existing structure, the Court noted:

"'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a certain segment have been entirely

¹³See, e.g., *Penn Central Transportation Co. v. City of New York*, *supra*, 438 U.S. at 123-24 (1978); *Loretto v. Teleprompter Manhattan CATV Corp.*, 453 U.S. 419, 426 (1982); *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. 264, 294-95 (1981).

abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here the city tax block designated as the ‘landmark site.’” (438 U.S. at 130-31; see also *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).)

Thus, in determining whether the property at issue here had been taken, it is necessary to examine the entire development rather than only the portion now owned by the bank. Since this approach was not followed by the courts below, no findings were made as to whether the parcel, with 212 existing units and apparently at least 67 more allowable, had been “taken.”

A different result cannot obtain merely because the original owners of the development have now sold a portion of it to respondent. This would allow to be done by indirect means precisely what was forbidden in *Penn Central*. Put another way, the validity of governmental regulations cannot change with shifts in ownership of the property being regulated. For example, if Penn Central were now to sell its air rights above Grand Central Terminal, the new owner would not be able to allege a taking any more successfully than could Penn Central itself. Similarly, as long ago as 1927, this Court upheld set back regulations requiring developers not to build within a given distance of the edge of their property against an argument that this constituted a taking of the property to be left vacant. *Gorieb v. Fox*, 274 U.S. 603 (1927). Surely the result would not be different had the set back areas been sold to a third party.¹⁴

¹⁴It was only by considering the original plans for the entire development that either of the courts below was persuaded that the respondent had acquired any expectations concerning the ability to build on the land now at issue. The artificial nature of the division employed in the decision below is therefore particularly glaring.

B. The Court of Appeals Erroneously Determined That the Ordinances in Question Were Required to Ensure a Profitable Use of Respondent's Property

Related to the artificial division of one development into two parcels for purposes of analyzing the taking question is the Sixth Circuit's analysis of the “economic viability” of plaintiff's parcel in isolation from the project as a whole.¹⁵

The Court of Appeal erroneously interprets prior cases to require that government allow uses which will make the ownership of every parcel of land economically viable.¹⁶ This is not the law, any more than is the government required to insure the profitability of any other investment. Examples are obvious. One who buys a parcel on top of a mountain will obviously encounter tremendous costs in attempting to provide urban services such as water and electricity. The fact that these services will be expensive does not somehow entitle the mountain's owner to construct a 200-story condominium tower, even if that is the only density which could reasonably be expected to yield a sufficient return to finance the extension of urban services. Were this not true, the parcels most ill-suited financially for intensive urban development, i.e., those furthest from the necessary services, would be entitled to the most intensive use since they would require the most intensive use to be financially viable. There are parcels of land which cannot yield a reasonable return on *any* investment. No governmental entity is required by the United States Constitu-

¹⁵The Sixth Circuit found a taking based on testimony that only 67 new building sites could be developed and that the cost of meeting the conditions of approval would be too great to permit a development of 67 houses to be profitable. (720 F.2d at 406.)

¹⁶The Court of Appeals seems to have applied only the economic viability test in determining whether a taking had occurred. It makes no mention of the extent of the investment the respondent had made in this property or of what reasonable expectations it could have formed at the time the investment was made.

tion to remedy this simple fact of nature and economics. Nor is government required to assure that all investors in real estate will make money.

CONCLUSION

For the foregoing reasons, amici curiae respectfully submit that the decision of the Court of Appeals for the Sixth Circuit, insofar as it finds petitioner liable in damages, should be reversed.

Dated: November 15, 1984

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IN THE

Supreme Court of the United States

OCTOBER TERM 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF
THE CITY OF ST. PETERSBURG, FLORIDA
IN SUPPORT OF REVERSAL**

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INTEREST OF *AMICUS CURIAE*

The City of St. Petersburg is a political subdivision of the State of Florida within the meaning of Rule 36 of the Rules of this Court and is thereby entitled to file its brief *amicus curiae*.

The City of St. Petersburg is genuinely interested in the instant case because this Court's determination of the question presented on certiorari will greatly affect the outcome of current and threatened litigation against the City involving the application of the Just Compensation Clause of the Fifth Amendment to the City's regulation of the use of land. A decision by this Court affirming the opinion of the court below could economically and adversely affect the City of St. Petersburg's exercise of its regulatory power in even the most conventional areas of land use regulation.

SUMMARY OF ARGUMENT

Just compensation under the Fifth Amendment of the U.S. Constitution is required only where a governmental act invades a private domain *and* creates a public domain, and where the government has manifested an intent to create a public domain in the affected property.

The history of the Just Compensation Clause and construction of the Clause prior to and in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), established the constitutional imperative that the government is required to pay just compensation only when the government converts a private domain into a public domain. *Mugler v. Kansas*, 123 U.S. 623 (1887).

That *Pennsylvania Coal* stated the minimum beneficial use rule is unequivocal. That rule places a limitation on exercises of governmental authority, other than the power of eminent domain, such that each landowner retains a minimum private beneficial use of his property. However, that decision does not hold that the minimum beneficial use rule commands just compensation for every overly restrictive government regulation. *Pennsylvania Coal* simply does not stand for the proposition claimed by the Sixth Circuit below or by the dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J., dissenting).

The mixing of the corollary rule of minimum beneficial use with the just compensation imperative by the dissent in *San Diego Gas & Electric Co.* and the Sixth Circuit Court is improper and has resulted in a judicial quagmire. An objective look from both historical and modern viewpoints indicates that Justice Holmes used the word "taking" in the *Pennsylvania Coal* decision not to describe an event requiring payment of just compensation, but as a shorthand description of an *invalid* regulation, a regulation that "goes too far." *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908); *Fred F. French Investing v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

Furthermore, temporary interference with the use of land does not constitute a taking. *Andrus v. Allard*, 444 U.S. 51 (1979); *Metro Realty v. County of El Dorado*, 222 Cal. App. 2d 508, 35 Cal. Rptr. 480 (1963). Sufficient damage in the constitutional sense, namely, a total deprivation, has not been incurred. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). Moreover, if the rule proposed by the court below is allowed to stand, the balance of power between the legislative and judicial branches of government will be irreparably disrupted—a result not intended by Justice Holmes' opinion in *Pennsylvania Coal*. For these reasons, the City of St. Petersburg respectfully requests this Court to reverse the opinion of the Court of Appeals for the Sixth Circuit.

ARGUMENT

A.

Introduction

The City of St. Petersburg respectfully urges this Honorable Court to fairly and clearly circumscribe the application of the Fifth Amendment Just Compensation Clause to the police power regulation of the use of land and to hold that just compensation is required only where:

- (1) a governmental act invades a private domain and creates a public domain, and
- (2) the government has manifested an intent to create a public domain in the affected property.

B.

Historically, just compensation was required only where government invaded a private domain and replaced it with a public domain.

For years the debate over the so-called "taking issue" has raged in the commentaries, the classrooms, and the courts, and on several occasions this Court has reached the periphery of the issue, unfortunately with little settling effect. See *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); and *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). The City of St. Petersburg respectfully submits that the time has come for this Court to impart clarity, certainty and continuity to this most important area of constitutional jurisprudence.

At the core of the "taking issue" is the Fifth Amendment of the U.S. Constitution which provides in pertinent part: "nor shall private property be taken for public use, without just compensation." On its face the clause is nothing more than its

historical antecedents¹—a constitutional imperative that the government is required to pay just compensation when the

¹ Our modern constitutional doctrine has its roots from Medieval England where the King was entitled to levy charges for the defense of his kingdom and for other royal purposes against those who held land. Out of attempts of English landholders to resist these levies emerged the Magna Carta. Of import to the current issue is Chapter 29 of the Magna Carta which usually translates as follows:

No freeman shall be arrested, or detained in prison, or deprived of his freehold, or in any way molested; and we will not set forth against him, nor send against him, *unless by the lawful judgment of his peers and by the law of the land.* (emphasis added).

The Clause is sometimes called Article 39 because the original 1215 Magna Carta contained 63 articles, of which the above was Article 39. By 1225 the Charter consisted of 37 Articles as the original 63 were pared down and consolidated of which the aforementioned was number 29. Faith Thompson, *The First Century of the Magna Carta*, (1926) at 2-3. The translation is from the following Latin text as reported by both McKechnie and by Coke:

Nulles liber homo capiatur, vel imprisonetur, aut disseisatur, aut utlagetur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre. (emphasis added).

Edwardo Coke, (Militie) *The Second Part of the Institutes of the Laws of England* (London 1797) at page 45. The translation of this text, especially the italicized portion, varies considerably, sometimes reading "No free man shall be . . . stripped of his . . . possessions," or, as in Coke's Second Institutes, "No man shall be disseised . . ." Coke, *supra* at page 46.

The colonists brought with them to the New World the ideas of Seventeenth and Eighteenth Century England. To understand the intellectual atmosphere which generated the Due Process Clause and the Just Compensation Clause, it is necessary to briefly examine prevalent legal and political concepts of Eighteenth Century America.

That judicial process must comport with basic standards of procedural fairness was an ancient English tradition which was melded by Sir Edward Coke with the revival of the Magna Carta to promote a theory of parliamentary supremacy. F. Bosselman, D. Callies and J. Banta, *The Taking Issue* (1973) at p. 89. In

(Footnote continued on following page.)

government converts a private domain into a public domain. *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871). See generally,

(Footnote continued from preceding page.)

addition to the extensive reading of the works of Coke, works by Sir William Blackstone were widely circulated during the colonial period. Blackstone, a strong advocate of the rights of liberty and property, went further than Coke and argued that even Parliament could not give consent to the King appropriating property for his own use unless the landowners were paid compensation:

So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an execution of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

Robert Malcom Kerr, *The Commentaries on the Laws of England of Sir William Blackstone* (1876) at 109-110.

In James Madison's initial draft of the United States Bill of Rights, he followed closely the Virginia Declaration of Rights which

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F. Bosselman, D. Callies and J. Banta, *The Taking Issue* (1973). The clause has also been construed as constituting

(Footnote continued from preceding page.)

provided that "men . . . cannot be taxed or deprived of their property for public uses without their own consent, or that of their representatives . . ." Virginia Declaration of Rights, Section 6, and "that no man be deprived of his liberty except by the law of the land, or the judgment of his peers." *Id.*, Section 8. When Madison's draft was offered to the House in a speech during the first session of Congress, on June 8, 1789, it added a requirement of "just compensation":

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.

"Madison Debates," 1 *Annals of Congress*, 1st Congress, 1st Session (1789) at 451-452; William B. Stoebuck, "A General Theory of Eminent Domain," 47 *Wash. L. Rev.* 553, at 595; Edmond Dumbauld, *The Bill of Rights and What it Means Today*, at 207.

The language, but not the substance changed slightly in Committee, probably also the work of Madison, and in Conference with the Senate, to its present form. Dumbauld, *supra*, at 211. The amendments were debated in the House and the Senate but apparently no record of any debate on the Just Compensation Clause exists. F. Bosselman, D. Callies and J. Banta, *The Taking Issue*, at 99.

All of these sources—English precedent, including the Magna Carta and other documents based on it, natural law, and civil law jurisprudence undoubtedly inspired Madison in his composition of the language of the Fifth Amendment. It should be remembered though that the Bill of Rights was intended to limit both the legislative and executive branches of the new government.

Certainly it would have been no limitation on the legislative branch to require that takings of property be in accordance with "the law of the land"—it was the legislature, after all, that would be making the law of the land. It is possible, therefore, that the just compensation language was added merely in an attempt to give some meaning to an oft-cited clause that would otherwise have been out of place. F. Bosselman, D. Callies and J. Banta, *The Taking Issue*, at 103. In the debates Madison expressed concern with the inadequacy of restraints on the legislature under the English system. See, *Annals of Congress*, 436 (1895).

something more: a limitation on exercises of governmental authority, other than the power of eminent domain, such that each landowner retains a minimum private beneficial use of his property. And therein lies the source of the legal cacophony of the "taking issue" that has drowned out reason and rationality in the evolution of modern land use controls because some courts have blended this corollary rule of minimum beneficial use with the just compensation imperative.

The source of the minimum beneficial use rule is obscure. In *Mugler v. Kansas*² this Court, unrestrained by the minimum beneficial use rule, sustained a prohibition on the brewing of beer even though it had the effect of destroying the "chief value" of a brewery. This was because this Court read *Pumpelly v. Green Bay Co.*,³ the apparent "source" of the corollary rule as holding that just compensation is only required where:

there was a "permanent flooding of private property," a "physical invasion of the real estate of the private owner, and a practical ouster of his possession." *His property was, in effect, required to be devoted to the use of the public, and, consequently, he was entitled to compensation.*⁴

Nevertheless, in *Pennsylvania Coal Co. v. Mahon*⁵ the minimum beneficial use rule was stated unequivocally:

The protection of private property in the Fifth amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend its qualification more and more until at last private

² 123 U.S. 623 (1887).

³ 80 U.S. 166 (1871).

⁴ 123 U.S. at 668.

⁵ 260 U.S. 393 (1922).

property disappears. *But that cannot be accomplished in this way under the Constitution of the United States.*⁶

Justice Holmes cited no precedence for the proposition, yet it has been clear that the police power can only go so far:

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.⁷

C.

The minimum beneficial use requirement of *Pennsylvania Coal* does not command just compensation for every overly restrictive regulation.

The City of St. Petersburg has no problem with the minimum beneficial use rule and readily accepts the logic of Holmes' pronouncement; however, the City respectfully submits that the proposition does not require, either as a matter of precedence or logic, that an exercise of the police power that does not involve the creation of a public domain, but is judicially determined to go "too far," requires just compensation.

⁶ 260 U.S. at 415 (emphasis added). See *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889). Holmes' source for his pronouncement seems to have been largely a matter of judicial philosophy.

⁷ 260 U.S. at 413.

First, Holmes' opinion simply does not stand for the proposition claimed by the Sixth Circuit or Justice Brennan's dissent in *San Diego Gas & Electric Co v. City of San Diego*.⁸

For years, "taking" mavens⁹ have claimed that Justice Holmes' opinion in *Pennsylvania Coal*¹⁰ stands for the proposition that "just compensation" must be paid when a police power regulation is declared to be confiscatory.¹¹ Literally thousands of lawsuits have been instituted under this theory of so-called "inverse condemnation;"¹² the debate over the availability of just compensation for "regulatory takings" has raged for years across the nation.¹³

The "taking" theorem "has its source" in Justice Holmes' opinion in *Pennsylvania Coal*:

The rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.¹⁴

An objective look at the opinion in *Pennsylvania Coal*, however, does not support the Sixth Circuit Court's hypothesis because it is evident that Holmes used the word "taking" in the opinion not to describe an event requiring payment of just compensation, but as a shorthand description of an *invalid* regulation.

At the simplest level, the issue in *Pennsylvania Coal* was the *validity* of a statute of the State of Pennsylvania which prohibited the mining of coal which would result in the subsidence of improvements on the surface of the land (princi-

⁸ 450 U.S. 621 (1981). See n.21, *infra*.

⁹ See Comment, Gideon Kanner, 33 *Land Use Law & Zoning Digest* (May 1981).

¹⁰ 260 U.S. 393 (1922).

¹¹ See generally, F. Bosselman, D. Callies & J. Banta, *The Taking Issue* (1973).

¹² See *Agins v. City of Tiburon*, 447 U.S. 255, 258, n.2 (1980).

¹³ C. Haar, *Land-Use Planning* 766 (3rd Ed. 1977). The amount of energy devoted to this subject is unfathomable.

¹⁴ 260 U.S. at 415.

pally roads and houses). The coal company challenged the Act on the grounds that it "destroy[ed] previously existing rights of property and contract" and the Supreme Court found itself confronted with the question of "whether the police power can be stretched so far."¹⁵ Holmes' answer was that the police power could not be extended so far and that a total prohibition of the coal company's use of its property "cannot be accomplished *in this way* under the Constitution of the United States" and was therefore invalid.¹⁶ This Court did not hold, as is often claimed, that the Kohler Act had actually effected a taking for public use which required payment of just compensation; rather, the Court found that the regulatory attempt to go "so far" was *invalid*.

It is our opinion that the act *cannot be sustained* as an exercise of the police power.¹⁷

That Holmes did not say that a police power regulation that "goes too far" actually becomes an exercise of the power of eminent domain is clear from his opinion:

[S]ome values are enjoyed under an implied limitation and must yield to the police power. *But obviously the implied limitation must have its limits*, or the contract and *due process clauses are gone*. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases *there must be an exercise of eminent domain and compensation* to sustain the act.¹⁸

The clarity of this proposition is apparently obscured for many by an ambiguous statement later in the opinion that "this is a question of degree" not "disposed of by general proposi-

¹⁵ 260 U.S. at 413.

¹⁶ 260 U.S. at 415 (emphasis added).

¹⁷ 260 U.S. at 414 (emphasis added).

¹⁸ 260 U.S. at 413 (emphasis added).

tions."¹⁹ The Court of Appeals for the Sixth Circuit and Justice Brennan construe this language as meaning that the police power and the power of eminent domain differ only "as a matter of degree" and that the nature of the power involved is determined by its effect on the value of property. Holmes' opinion *in pari materia*, taken together with his prior opinions on the subject, reveals that the "question of degree" to which Holmes referred was the *effect* of public action, not the nature of the power involved. That the effect of eminent domain and the police power on private property differ only as a matter of degree does not mean that the powers themselves differ only as a matter of degree. Indeed, the law recognizes the police power and the eminent domain power as separate and distinct powers and subjects them to differing procedural and substantive due process requirements.

D.

The word "taking" in *Pennsylvania Coal* was used as a metaphor and does not command just compensation for the deprivation of the minimum beneficial use of property.

Holmes' use of the word "taking", and its intended meaning, were cogently analyzed in *Fred F. French Investing v. City Of New York*²⁰ by then Chief Judge Breitel of the New York Court of Appeals:

True, many cases have equated an invalid exercise of the regulatory zoning power, perhaps only *metaphorically*, with a "taking" or a "confiscation" of property, terminology appropriate to the eminent domain power and the concomitant right to compensation when it is exercised.

The *metaphor* should not be confused with the reality. Close examination of the cases reveals that in none of

¹⁹ 260 U.S. at 416.

²⁰ 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

them, anymore than in the *Pennsylvania Coal* case (*supra*), was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory". Instead, in each the gravamen of the constitutional challenge to the regulatory measure was that it was an invalid exercise of the police power under the due process clause. . . .²¹

Notwithstanding the logic of Breitel's analysis, Justice Brennan in his dissent in *San Diego Gas and Electric Co.* dismisses the metaphor analysis as "tampering with the express language of the opinion" of Justice Holmes.²² To the contrary, the express language of Justice Holmes' opinion, taken *in pari materia*, confirms the metaphor. The issue in *Pennsylvania Coal* was not whether the State of Pennsylvania's enactment of

²¹ 39 N.Y. 2d at 594 (emphasis added). One explanation of Holmes' recourse to the "taking" metaphor is the judicial environment at the time of the *Pennsylvania Coal* decision. Holmes was an outspoken critic of the Supreme Court's use of substantive due process as a vehicle for invalidating state legislation. See e.g. *Lochner v. City of New York*, 198 U.S. 45 (1905) (Holmes, J., dissenting). He openly decried the Court's open-ended use of due process whereby judicial judgments were substituted for that of legislative branches of government. In *Pennsylvania Coal*, however, Holmes found himself confronted by a statute that he apparently could not support ("The damage is not common or public. The extent of the public interest is shown by the statute to be limited . . ." 260 U.S. 393, 413 (1922) (citation omitted).) Yet to invalidate the statute as violative of the Due Process Clause would have placed Holmes in the unthinkable position of invoking substantive due process to invalidate a state statute. His use of the "taking" metaphor permitted Holmes to invalidate the act on the basis of substantive due process but with a limitation that was not open-ended because his standard was limited to an objective determination of minimum beneficial use. It would be an unfortunate irony if Holmes' attempt to limit judicial interference with legislative policy to its narrowest possible confines were, 60 years later, to serve as the vehicle for the most disruptive judicial incursion ever into the legislative process, a decision that would convert every invalid legislative act into a crippling claim on the public fisc.

²² 450 U.S. at 649, n.14.

the Kohler Act was compensable, but whether the Act was *valid*. (See Argument for Plaintiff in Error "The statute *takes* the property of the Coal Company without *due process of law*."²³) In fact, one argument advanced by the coal company was that "[i]f surface support in the anthracite district is necessary for public use, it can constitutionally be acquired *only by condemnation* with just compensation to the parties affected."²⁴

The word "taking" first appears on page 414 of the opinion in *Pennsylvania Coal* where Holmes is discussing the balance of public and private interests involved in the case:

"[T]he extent of the public interest is shown by the statute to be limited. . . . On the other hand the extent of the *taking* is great."²⁵

If Holmes had intended the word "taking" in the literal sense that Justice Brennan and the Sixth Circuit now ascribe to it, Holmes would have gone no further because a "taking" is a "taking," and once it is effected, no matter how small, mandates payment of just compensation.²⁶ It is imprudent, at the least, to enshrine what is by definition "mere dictum" as sanctimony; and, if one reads the "express language" of *Pennsylvania Coal*, one cannot help but see the metaphorical nature of Holmes' use of the word "taking." Holmes was not using the word to describe "taken for public use" but was using it as a shorthand description of the *effect* public action may have on the value of property. The Sixth Circuit Court's rigid literalism in its reading of Holmes' opinion

²³ 260 U.S. at 395 (emphasis added).

²⁴ 260 U.S. at 400 (emphasis added).

²⁵ 260 U.S. at 414 (emphasis added).

²⁶ This is precisely what Justice Brennan opines in his dissent. 450 U.S. at 653-54.

is particularly ironic in the face of Justice Holmes' oft-quoted appreciation for the dynamic character of language:

A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time which it is used.²⁷

That Holmes used the word in a "metaphorical" sense is supported not only by the language and the result in *Pennsylvania Coal* but is also supported by his use of the word "taking" to refer to a statute's invalidity in other cases involving constitutional limitations on exercises of the police power. For example, in *Block v. Hirsch*,²⁸ Justice Holmes used the word "taking" in an obviously metaphorical sense:

All the elements of a public interest justifying some degree of public control are present. The only matter that comes to us open to debate is whether the statute goes too far. For just as there seems a point at which the *police power ceases and leaves only that of eminent domain*, it may be conceded that regulations of the present sort pressed to a certain height might amount to a *taking without due process of law*.²⁹

Similarly, in *Martin v. District of Columbia*,³⁰ Holmes made it clear that he did not regard an overly restrictive regulation as triggering an award of compensation. Rather, he indicated that an actual taking under the Fifth Amendment can be accomplished only through an exercise of the power of eminent domain—not by regulatory inadvertence:

Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation *and taking by eminent domain*.³¹

²⁷ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

²⁸ 256 U.S. 135 (1921).

²⁹ 256 U.S. at 156 (emphasis added).

³⁰ 205 U.S. 135 (1907).

³¹ 205 U.S. at 139 (emphasis added).

The most explicit statement of the Holmesian "taking" metaphor is found in *Hudson County Water Co. v. McCarter*.³²

[T] police power may limit the height of buildings, in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and *the police power would fail*. To set such a limit would need compensation and *the power of eminent domain*.³³

Moreover, the "taking" metaphor was in common usage as a short hand description of a regulatory action that was *invalid* at the time of Holmes opinion.³⁴ Simply put, Holmes was not

³² 209 U.S. 349 (1908).

³³ 209 U.S. at 355 (emphasis added).

³⁴ See, e.g., *Bauman v. Ross*, 167 U.S. 548 (1897) ("failed to provide for the just compensation required by the Constitution . . . and . . . was . . . consequently . . . void." (emphasis added)). In point of fact, the "taking" metaphor was in common usage as a short hand description of a regulatory action that was *invalid* at the time of Holmes' opinion in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). See e.g., *Bill Posting Sign Co. v. Atlantic City*, 71 N.J.L. 72, 58 A. 342 (1904) ("a statute which purports to give unlimited power to regulate the erection of signs on private property would be an attempt to authorize the *appropriation* of private property to public use without compensation, and [is] therefore *inimical* to our constitutional provision." (emphasis added)); *Stockdale v. Rio Grande Western Ry. Co.*, 28 Utah 201, 209-10, 77 P. 849, 852 (1904); *Hartman v. Tresise*, 36 Colo. 146, 84 P. 685 (1905); *State v. Robb*, 100 Me. 189, 186, 60 A. 874, 876 (1905) ("It may therefore be regarded as settled that reasonable health regulations . . . are not *void* as *taking* property without due process of law, or as a *taking* of private property without . . . just compensation" (emphasis added)); *Riley v. Town of Greenwood*, 76 S.C. 90, 96, 51 S.E. 532, 534 (1905) ("[t]he ordinance in question was *illegal*, as an attempt . . . to *take* the property of the plaintiff without compensation and to deprive her of her property without due process of law." (emphasis added));

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saying that an overly restrictive regulation actually effects a compensable taking; rather, he was making the point that the Constitution says that government can accomplish a prohibition of all practical use of property only through an exercise of the power of eminent domain.

[S]ome values are enjoyed under the implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the

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M. Wineburgh Advertising Co. v. Murphy, 129 A.D. 260, 262, 113 N.Y.S. 885, 887 and 886 (App. Div. 1980), *aff'd*, 195 N.Y. 126, 88 N.E. 17 (1909) ("It is quite clear that the ordinance constitutes a *taking* of the property . . . the ordinance . . . cannot be *upheld* as a valid exercise of the police power. . . ." (emphasis added)); *City of St. Louis v. Dreisoerner*, 243 Mo. 217, 147 S.W. 998 (1912); *Vreeland v. Forest Park Reservation Commission*, 82 N.E. Eq. 349, 87 A. 435 (1913); *Standard Bill Posting Co. v. Hastings*, 77 Misc. 453, 137 N.Y.S. 186 (Sup. Ct.), *aff'd*, 153 A.D. 920, 138 N.Y.S. 1137 (1912), *aff'd*, 207 N.Y. 763, 101 N.E. 1118 (1918); *Romar Realty Co. v. Board of Commissioners of Haduonfield*, 96 N.J.L. 117, 120, 114 A. 248, 250 (1921) ("Deprivation or limited use of one's property is unlawful, and the ordinance which compels it is *invalid*, if the *taking* cannot be justified by the exercise of the police power." (emphasis added)); *In re Kansas City Ordinance No. 39946*, 298 Mo. 569, 252 S.W. 404 (1923); *Piper v. Ekern*, 180 Wis. 586, 194 N.W. 1076, 130 A. 534 (1925) ("This provision is, in our opinion, *illegal*. It is not a *valid* exercise of the police power. It is the *taking* of private property for public purposes without just compensation being made to the owner." (emphasis added)); *Ware v. City of Wichita*, 113 Kan. 153, 214 P. 99 (1923); *Johnson v. City of Charleston*, 91 W.Va. 318, 112 S.E. 577 (1922); *State v. Hillman*, 110 Conn. 92, 105, 147 A. 294, 299 (1929) ("Regulations may result to some extent practically in the *taking* of property, or the restricting its uses, and yet not be deemed confiscatory or unreasonable." (emphasis added)). In not one of these cases is the term "taking," as applied to a regulatory action, given literal meaning and in not one of them were money damages awarded.

extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act.³⁵

Read in its entirety, the *Pennsylvania Coal* opinion recognizes that there are two separate and distinct powers. Regulations which are overly restrictive in the constitutional sense—that is, have an effect which is equivalent to a taking for public use (which can only be accomplished through an exercise of the power of eminent domain)—are invalid. This distinction is expressly established in Holmes' closing paragraph:

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it and we assume that an exigency exists that would warrant the exercise of eminent domain.³⁶

There is other evidence that Holmes had no intention of rewriting the Constitution and overruling the holding of *Mugler v. Kansas*,³⁷ as Justice Brennan and the Sixth Circuit would

³⁵ 260 U.S. at 413.

³⁶ 260 U.S. at 416.

³⁷ 123 U.S. 623 (1887). What Holmes actually intended in *Pennsylvania Coal* is difficult to discern, however, his focus is at least partially revealed in his correspondence with Sir Frederick Pollock. Holmes wrote:

I enclose one of my last decisions that you may judge whether there is any falling off. It was unpopular in Pennsylvania of course. Brandeis' dissent speaks as if what I call average reciprocity of advantage were made the general ground by me. Not so I use that only to explain a particular case. My ground is that the public only got to this land by paying for it and that if they saw fit to pay only for a surface right they can't enlarge it because they need it now any more than they could have taken the right of being there in the first place. Perhaps it would have been well if I had

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have us believe. Just three years before *Pennsylvania Coal*, Holmes wrote an opinion in *Pierce Oil Corp. v. City of Hope*,³⁸ wherein he considered the validity of a municipal regulation governing the location of petroleum storage tanks. In sustaining the regulation, Holmes cited *Mugler*, the case the pundits now claim he overruled in *Pennsylvania Coal*.³⁹ Surely Holmes, so obviously familiar with the fundamental principles of *Mugler*, would have explicitly referred to *Mugler* in *Pennsylvania Coal* if he had intended to depart so radically from its holding. Moreover, in *Samuels v. McCurdy*,⁴⁰ decided after *Pennsylvania Coal*, Chief Justice Taft quoted extensively from *Mugler* ("police power is very different from taking") without the slightest hint of dissent from Holmes.⁴¹ It can be assumed that Taft's reliance on *Mugler* would have been decried by so rigorous a legal scholar as Holmes if he had in fact intended to overrule its

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emphasized more the distinction between the rights of the public in places where they only get any locus standi by a transaction that renounced what they now claim.

And Pollock answered:

In your later case of the *Pennsylvania Coal Co.*, it seems to me, though I always feel diffident about these constitutional questions, that if Brandeis' dissent were right the Fourteenth Amendment would be eviscerated: and your opinion exposes the fallacy of stretching the police power to that extent in a very convincing fashion. There was no such case on the facts, I suppose, as that the Coal Co. threatened and intended to let down the whole city of Philadelphia and had refused all offers of reasonable compensation. That the destruction of this or that dwelling house taken by itself is necessarily a bad thing is very far from obvious: I know many by sight which I would gladly see devoured by a mine, a dragon, or anything else. . . . M. Howe, *Holmes-Pollock Letters—The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932* (Cambridge, Mass. 1941).

³⁸ 248 U.S. 498 (1919).

³⁹ See, 450 U.S. 621 (Brennan, J., dissenting).

⁴⁰ 267 U.S. 188 (1925).

⁴¹ 267 U.S. at 196.

precepts in *Pennsylvania Coal*. *Mugler* was also cited in *Miller v. Schoene*,⁴² again without dissent from Holmes. In *Clarke v. Haberle Brewing Co.*⁴³ Justice Holmes himself drew upon *Mugler v. Kansas* for authority:

It seems to us plain without help from *Mugler v. Kansas*, 123 U.S. 623, that when a business is extinguished as noxious under the Constitution the owners cannot demand compensation from the Government⁴⁴

Holmes' "taking" quote does not mean that an overzealous regulation constitutes a compensable event; rather, it indicates that a regulation which has an impact on property equivalent to a "taking" is invalid, void *ab initio*. If the government wishes to achieve such an impact on property—that is, the equivalent of a taking—it must do so through an exercise of the power of eminent domain, not through regulation. To quote Justice Holmes: "When [a restrictive regulation] reaches a certain magnitude, in most if not in all cases *there must be an exercise of eminent domain* . . ."⁴⁵

E.

Modern interpretations of the word "taking" do not command just compensation for the deprivation of the minimum beneficial use of property.

Modern examples of the "metaphorical" use of the word "taking" can also be found. In *Agins v. City of Tiburon*,⁴⁶ this Court, in a *per curiam* opinion, used the word "taking" not to describe a compensable event, but as a shorthand description of when a regulation is *invalid*.

The application of a general zoning law to a particular property effects a *taking* if the ordinance *does not*

⁴² 276 U.S. 272 (1928).

⁴³ 280 U.S. 384 (1930).

⁴⁴ 280 U.S. at 386.

⁴⁵ 260 U.S. at 413 (emphasis added).

⁴⁶ 447 U.S. 255 (1980).

substantially advance legitimate state interests, or denies an owner economically viable use of his land.⁴⁷

In this quote the Court is saying, unmistakably, that a regulation which *fails to advance a legitimate state interest* (which it is settled violates the *due process clause*) is a "taking": an obvious use of the word "taking" in its metaphorical sense and a shorthand description of a regulation that is *invalid*. In *Penn Central Transportation Co. v. City of New York*,⁴⁸ a challenge to the City of New York's landmark preservation regulations, the word "taking" is frequently used in Justice Brennan's majority opinion. Yet, *Penn Central* does not say that a regulation that goes too far requires a payment of just compensation; it says that such a regulation is *invalid*.

Indeed, we have frequently observed that whether a particular restriction will be rendered *invalid* by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."⁴⁹

In *Pruneyard Shopping Center v. Robins*,⁵⁰ the United States Supreme Court considered whether a state court construction of a state constitution subjecting private property to public use constituted a "taking." Once again, "taking" was not used in its literal just compensation sense because the Court held that there had figuratively been a "taking," but not in the constitutional sense.

[T]he determination whether a state law *unlawfully* infringes a landowner's property in violation of the Taking Clause . . .⁵¹

⁴⁷ 447 U.S. at 260 (emphasis added) (citations omitted).

⁴⁸ 438 U.S. 104. Generally regarded as an historic preservation case when published but increasingly viewed as a forecast of taking opinions to come.

⁴⁹ 438 U.S. at 124 (emphasis added) (citations omitted).

⁵⁰ 447 U.S. 74 (1980).

⁵¹ 447 U.S. at 82-83 (emphasis added).

Pruneyard proposes that a judicial determination that a regulation constitutes a "taking" does not require payment of compensation; the case says that a government action which attempts to effect a "taking" without payment of just compensation, would be *unlawful*, that is, invalid.

Similarly, in *Andrus v. Allard*⁵² the word "taking" is used as a shorthand description of a regulation which is invalid. Also, in *Kaiser Aetna v. United States*,⁵³ this Court was careful to point out that if the government wanted to "take" the interest involved, it could do so *only* by "invoking its eminent domain power *and* paying just compensation . . ."⁵⁴

F.

Temporary interference by government resulting in mere diminution in value of property is not a taking and does not command just compensation.

The "constitutional rule" embraced by the Sixth Circuit Court fails for reasons other than a misreading of Justice Holmes' opinion. For example, the "temporary" or "interim" taking concept is at variance with well-established jurisprudence in regard to moratoria—that is, temporary prohibitions on all use of land. Moratoria are generally regarded as valid exercises of the police power, provided that they are limited in their period of application.

Reasonableness . . . is the yardstick by which the validity of a zoning ordinance is to be measured and reasonableness in this connection is a matter of degree. A temporary restriction upon land use may be . . . a mere inconvenience where the same restriction

⁵² 444 U.S. 51 (1979).

⁵³ 444 U.S. 164 (1979).

⁵⁴ 444 U.S. at 180 (emphasis added).

indefinitely prolonged might possibly metamorphize possibly into oppression.⁵⁵

Application of the Sixth Circuit Court's "constitutional rule," however, would require a payment of just compensation for any temporary interference with the use of property, a consequence that conflicts with years of established jurisprudence.

The absurdity of the proposed "rule" is underscored in *Agins* where this Court notes that mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership" and *do not* constitute a "taking."

Even if the appellants ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when proceedings ended. Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership . . .".⁵⁶

More importantly, it is well-settled that a mere diminution in the value of property does not constitute a violation of the Constitution. In *Andrus v. Allard* this Court described the Hofeldian theory of property and pointed out that the destruction of one strand of the bundle of property rights does not constitute a taking "because the aggregate must be viewed in its entirety."⁵⁷ The temporary interference in the use of land for which the Sixth Circuit allows just compensation destroys only one part or one "strand" of the Hofeldian bundle of rights⁵⁸ the right to use property during a regulatory embroglio.⁵⁹ Property

⁵⁵ *Metro Realty v. County of El Dorado*, 222 Cal. App.2d 508, 516, 35 Cal. Rptr. 480, 485 (1963).

⁵⁶ 447 U.S. 263 n.9.

⁵⁷ 444 U.S. at 66.

⁵⁸ *Berger, Land Ownership and Use* § 1.2 (3rd Ed. 1983).

⁵⁹ *See, Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd after remand*, 690 F.2d 734 (1983).

has value in many dimensions, including total present worth and value over time. (Time sharing or interval ownership are contemporary examples of the division of property into temporal segments.) The inconvenience of a temporary interference in the use of land while a court tests the validity of a police power regulation only destroys a part of one strand of the bundle of rights of property and therefore can hardly be said to be a "taking" when viewed in the aggregate.

Minimal appreciation of real estate finance is required to grasp the fact that a temporary interference in the use of land may have far less impact on the aggregate value of a parcel of land than the diminution in value that was accepted as valid by this Court in *Goldblatt v. Town of Hempstead*⁶⁰ or *Andrus v. Allard*. In fact, when compared with the diminution in value involved in *Haas v. City and County of San Francisco*⁶¹ and *Village of Euclid v. Ambler Realty Company*,⁶² a mere temporary interruption in use pales in significance.

Consider, for example, a \$1,000,000 parcel of land that is downzoned. If the diminution in value is only \$900,000, then a minimum beneficial use is preserved to the owner and the landowner's economic loss is deemed to be *damnum absque injuria*. On the other hand, if the diminution in value goes "too far," then just compensation is required for the period the regulation was in place under the Circuit Court's holding. If the period of time of over-regulation is two years, for example, then the actual economic injury to the landowner will be lost rentals for the period ($15\% \times \$1,000,000 \times 2 \text{ yrs.} = \$300,000$). Use of contemporary economic theory to convert the loss of two

⁶⁰ 369 U.S. 590 (1962).

⁶¹ 605 F. 2d 1117 (9th Cir. 1979), *cert. denied* 445 U.S. 928, (1980).

⁶² 272 U.S. 365 (1926).

years of rental income to a diminution in present value yields an impact that is far less than the injury suffered by the valid downzoning.

In other words, mere fluctuations in value during the process of governmental decision-making including judicial review of local legislative decisions, absent extraordinary delay, should be recognized as "incidents of ownership." They cannot be considered as a "taking" in the constitutional sense. A temporary interference does not displace ownership, does not invade the private domain or does not make actual use of property. To the contrary, a temporary interference, by definition, merely interrupts private use of property. At the most, such an interference can only diminish the cumulative value of property over time, and it is well-settled that a mere diminution in value does not invalidate a police power regulation.⁶³

[A] reduction in the value of the property caused by the zoning ordinance is not, of itself, enough to render the ordinance confiscatory.⁶⁴

The Sixth Circuit's proposed "principle" also runs afoul of the long-established concept of balance of powers. If the Circuit Court's constitutional rule is given effect, then the courts will be *obligated* to order compensation in every case of regulatory invalidity. This judicial "transmogrification" of regulatory enactments into exercises of the power of eminent domain would upset the delicate balance between co-equal branches of government in perhaps the most sensitive area of all—control over federal, state and local budgets.

⁶³ See e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, (1926) (diminution of 75%); *Hadachek v. C. E. Sebastian*, 239 U.S. 394, (1915) (diminution of 87½%); *Haas v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied* 445 U.S. 928 (1980) (diminution of 95%).

⁶⁴ *City of Clearwater v. College Properties, Inc.*, 239 So.2d 515, 517 (Fla. 2d DCA (1970)).

Legislative deliberations to enact regulations and to exercise the power of eminent domain are not identical in scope or in effect. Both involve an inquiry into the need for the public objective under consideration and the effect of the proposed action on the property in question, its immediate neighborhood, and the community as a whole. If the objective can be met with a regulation, then the government's inquiry need go no further. If the objective, however, can only be achieved through an exercise of the power of eminent domain, then the government must go further and make a cost/benefit analysis of the proposal while balancing the objective and its projected cost against all other public objectives which are competing for available budget monies. Were the courts to award compensation for overly restrictive regulation, this fundamental policy-making process of balancing competing public objectives would be eliminated, and judicial dictates could control the character of day-to-day municipal affairs. On remand from *Lake Country Estates v. Tahoe Regional Planning Agency*,⁶⁵ a United States District Court recognized this very issue.

If a zoning ordinance is enjoined, the legislative body, rather than the court, can then decide whether the social benefits flowing from the plan warrant the exercise of eminent domain and the expenditure of public resources. When the legislature decides that the costs outweigh the benefits, it can either abandon the objective entirely, enact less stringent regulation, or combine regulation with compensation.⁶⁶

The balance of powers is easily preserved, however, if the police power and the power of eminent domain are recognized as separate and distinct powers, and if relief from overly restrictive regulations is limited to declaratory and injunctive relief. By striking an overly restrictive regulation, the courts

⁶⁵ 440 U.S. 391, (1979). See also, 260 U.S. at 416.

⁶⁶ *Jacobson v. Tahoe Regional Planning Agency*, 474 F.Supp. 901, 904 (D. Nev. 1979)

preserve the legislature's opportunity to make a cost-benefit decision because the legislature is able to choose between relaxing the applicable regulations or, if they determine that the desired objective merits a budgetary allotment, institute eminent domain proceedings. In this way, the balance of powers is preserved and the constitutional wrong is vindicated.

The literal meaning accorded to the word "taking" under the Circuit Court's theory of liability will inexorably draw the courts into the daily affairs of local government and accomplish an ironic perversion of Justice Holmes' philosophy of deference to legislative discretion: "The widest scope must be permitted to the inventions of statesmanship, the experimentation and bunnings of legislatures."⁶⁷ Nothing in the Constitution provides any basis for a new constitutional rule that now, after 200 years of consistent constitutional jurisprudence during which the recognized remedy for unconstitutional regulation was invalidation, has tilted the balance away from deference to legislative discretion to a judicial theory of strict liability.

Finally, the judicial philosophy that economic costs imposed on individuals by governmental error should be distributed as a fair share cost on the public at large attempts to engraft a theory of "liability as a deterrent" on the Just Compensation Clause.⁶⁸

The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for

⁶⁷ Frankfurter, "Twenty Years of Mr. Justice Holmes' Constitutional Opinions," 36 *Harv. L. Rev.* 909, 928-9 (1923).

⁶⁸ It is important that this Court not confuse the constitutional imperative of just compensation with the availability of damages under 42 U.S.C. § 1983 or other equitable forms of action. See e.g., *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982), aff'd. after remand, 699 F.2d 734 (1983). Whether damages are appropriate in land use cases under 42

(Footnote continued on following page.)

officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.⁶⁹

The trouble with the deterrence theory is that what is an overly restrictive regulation is not amenable to the sort of detailed delineation the courts have erected under the Fifth Amendment. Justice Brennan has candidly conceded that:

[T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.⁷⁰

Police power regulation of land use is not reducible to simple equations and the ever-changing face of our nation condemns us to an ever-shifting standard of what will be determined "overzealous." It would have been a bold and

(Footnote continued from preceding page.)

U.S.C. § 1983 (1970) is governed by principles of statutory construction and equity, while the availability of just compensation for overly restrictive regulations is a matter of constitutional jurisprudence and *stare decisis*. While the results under either theory may be similar, a matter to be resolved not in this case but in another case, the distinction is a significant one. That is so because the application of the damages/just compensation rules would, notwithstanding the clarity of this Court's holding, turn on the individual facts of each case. If just compensation is deemed available, notwithstanding the total absence of a doctrinal basis¹ for such a holding, the job of judicial application will be much confused. In contrast, if the constitutional jurisprudence of *Mugler*, *Pennsylvania Coal*, *Penn Central*, *Agins*, *Hadacheck*, *Goldblatt* and *Andrus v. Allard* are left intact then the availability of damages, under 42 U.S.C. § 1983, if any, will be established free from the ambiguities that currently plague this area of the law.

⁶⁹ *Owen v. City of Independence, Missouri*, 445 U.S. 622, 651-52 (1980).

⁷⁰ 438 U.S. at 124

oracular official who could have predicted with confidence that the Supreme Court of Wisconsin would sustain the wetlands regulations at issue in *Just v. Marinette County*.⁷¹ The deterrent theory simply will not work in the face of the amorphous constitutional standards which control planning law. Consider a "Miranda" card for planning decisions replete with "mays" and "perhaps," words that defy the concept of clear rights on which the deterrent theory is based. "You may have the right to . . ." could not survive a vagueness challenge, yet the Sixth Circuit proposes liability without a concomitant delineation of what a regulatory authority must do in order to avoid liability.

⁷¹ 56 Wis., 2d 7, 201 N.W.2d 761 (1972).

CONCLUSION

The opinion below departs from well-established precedents of this Court that just compensation under the Fifth Amendment is required only where government action converts a private domain to a public domain. This Court has not held that the minimum beneficial use rule commands just compensation for overly restrictive government regulation. However, the Sixth Circuit Court wrongfully and illogically holds that just compensation is required where the government's police power regulation of the use of land deprives a landowner of the minimum beneficial use of his land. Thus, the City of St. Petersburg respectfully urges this Honorable Court to reverse the judgment of the court below and hold that just compensation is required only where a governmental act invades a private domain and creates a public domain, and where the government has manifested an intent to create a public domain in the affected property.

Respectfully submitted,

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IN THE
SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, et al.,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK
AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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1984

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IN THE
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INTEREST OF THE AMICUS CURIAE

On a daily basis, the municipal government of the City of New York makes countless discretionary decisions affecting how New Yorkers utilize the land within the boundaries of this City. In

particular, City commissions regularly exercise their police power with respect to specific parcels of property through zoning, historic district regulation, and landmark preservation. Accordingly, the City of New York is very much concerned about the practical implications of the Court of Appeals' reasoning in this matter.

The holding of the Court of Appeals for the Sixth Circuit would expand the liability of local and municipal governments by exposing them to money judgments where an owner's beneficial use of property is found to be so restricted as to constitute a taking. The propriety of compensation as a remedy in such cases is an issue which affects both urban and rural communities, inasmuch as exposure to money judgments for land-use regulations enacted in good faith, but later deemed confiscatory, would impede the exercise of discretionary governmental power in matters of vital public interest.

This brief is submitted pursuant to Rule 36.4 of the rules of this Court in support of petitioners' request for reversal.

ARGUMENT

ASSUMING, ARGUENDO, THAT A LAND-USE REGULATION IS INVALIDATED ON CONSTITUTIONAL GROUNDS, THE PROPERTY OWNER IS NOT ENTITLED TO A MONEY JUDGMENT FOR DAMAGES CAUSED BY THE ENACTMENT AND FINANCIAL LIABILITY SHOULD NOT BE IMPOSED ON THE LOCAL GOVERNMENT.

In the instant case, the Court of Appeals would permit damages to be awarded for a temporary "taking" by a regional planning commission, which, acting in good faith and after affording the developer full procedural due process, enforced certain lawfully-enacted zoning ordinances. This holding is premised on a broad reading of the Just Compensation Clause of the Fifth Amendment.*

In recent terms, this Court has had several opportunities to consider the impact of local

*"[N]or shall private property be taken for public use, without just compensation." This Fifth Amendment prohibition is applicable to the states through the Fourteenth Amendment. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 US 155, 160 (1980).

ordinances imposing restrictions on an owner's use of his property. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 US 419 (1982); San Diego Gas & Electric Co. v. City of San Diego, 450 US 621 (1981); Agins v. City of Tiburon, 447 US 255 (1980). However, none of these decisions squarely addressed the issue of the kind of relief to be awarded where the use of property has been restricted without a physical invasion of the property and the owner has not been deprived of all reasonable use of the property.

In essence, the Circuit Court has held that compensation is payable herein because the local government denied the landowner the most beneficial use of his property. This, we submit, falls far short of a "taking" within the meaning of the Just Compensation Clause. Nevertheless, assuming, arguendo, that the land-use regulations in question are unreasonable, an injunction and a declaratory judgment would be the usual forms of relief. These remedies have been considered fully adequate in prior federal and state actions successfully

challenging the constitutionality of regulations enacted pursuant to the police power. See, e.g., Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir., 1983); Eck v. City of Bismarck, 283 NW2d 193, 201-02 (N.D. Sup. Ct., 1979); Gold Run, Ltd. v. Board of County Commissioners, 554 P2d 317, 319 (Colo. Ct. App., 1976).

In New York, as in other states, landowners who have been adversely affected by a municipal determination have the right to seek expeditious judicial review. For example, under Article 78 of the Civil Practice Law and Rules, a New York property owner may institute a summary proceeding challenging the determination of any public body or officer affecting him. Where warranted, injunctive relief and a declaratory judgment with respect to the challenged act or regulation may be granted.

The approach followed by the New York courts is exemplified by Fred F. French Investing Company, Inc. v. City of New York, 39 NY2d 587, 350 NE2d 381, cert. denied, 429 US 990 (1976). The

French case dealt with an amendment to the New York City Zoning Resolution by which the Tudor City parks were rezoned for the use of the public. Although the New York Court of Appeals found this zoning amendment unconstitutional, it was not treated as a "taking." The Court held that, in all but exceptional cases, an unreasonable regulation of the use of private property will not compel the payment of compensation. Instead, such a regulation will be treated as a denial of due process and invalidated. Id., 39 NY2d at 593-95, 350 NE2d at 384-86. Thus, the property owner challenging a land-use regulation has no viable cause of action for an "inverse taking" under New York law, but he can obtain declaratory and injunctive relief.*

*In contrast to the usual condemnation proceeding, in which the government, in the exercise of its power of eminent domain, takes action to condemn property for a public purpose, some jurisdictions permit a landowner to institute an "inverse condemnation" suit, seeking compensation for the "taking" of property where no formal condemnation proceeding has been commenced. See Agins v. City of Tiburon, 447 US 255, 258, n. 2 (1980); United States v. Clarke, 445 US 253, 255-58 (1980).

In French, the Court of Appeals failed to reach the issue of whether an illegal exercise of discretionary governmental power could provide the basis for an award of damages, finding that this issue was not properly before the Court. Id., 39 NY2d at 599, 350 NE2d at 388-89. Although the plaintiffs sought review in this Court of the denial of compensation, their appeal was dismissed and certiorari was denied. 429 US 990 (1976).

Thereafter, this Court had another opportunity to consider a property owner's entitlement to compensation in the event of invalidation of a police power regulation. See Penn Central Transportation Co. v. New York City, 438 US 104 (1978), aff'g, 42 NY2d 324, 366 NE2d 1271 (1977). The City argued in Penn Central that even if the Landmarks Law were invalid, the owners were in no event entitled to damages or compensation.* This Court ultimately concluded that there had been no "taking" of property by the City. Id., 438 US at 138.

*See Appellees' Brief at 37-39.

In so holding, this Court noted that a land-use regulation cannot be deemed confiscatory merely because it impairs an owner's full beneficial use of his property (id. at 131):

[T]he decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a "taking," see Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (87 1/2% diminution in value); cf. Eastlake v. Forest City Enterprises, Inc., 426 U.S., at 674, n. 8

See also Agins v. City of Tiburon, supra, 447 US at 260-62; Andrus v. Allard, 444 US 51, 66 (1979).

Here, the Circuit Court concluded that the land retained no significant economically viable use and went far beyond merely invalidating the county's enactments as unconstitutional. By providing for the award of compensation, it has raised the specter of liability for money judgments whenever the police power is used to restrict land

use in an innovative way. This Court has previously recognized the "State's broad power to impose appropriate restrictions upon an owner's use of his property." Loretto, supra, 458 US at 441 (emphasis in original). See also Schad v. Borough of Mount Ephraim, supra, 452 US 61, 68 (1981). To expose counties and municipalities to liability in damages for discretionary determinations made in the exercise of that broad power would seriously impede vital governmental functions.

Given the number of areas in which local governments must take action, the scope of liability suggested by the Circuit Court may well be unlimited. Yet, it is essential that local governments have the capacity to act in good faith, on an emergency basis and without undue interference with the decision-making process. While it is argued that damages may have some deterrent effect where municipalities are considering clearly unconstitutional measures, the possibility of such awards could also lead to stagnation. Local officers may deem the status quo

safer than any untested measures, however beneficial they might prove to the public as a whole.

We find most troubling the Circuit Court's suggestion that there could be a compensable taking in the absence of any vested right on the part of the landowner to finish its development (729 F2d at 407). "[I]nterference with investment-backed expectations" is but one factor to be considered in assessing the economic impact of a regulation under the Takings Clause. Loretto, supra, 458 US at 426. Ordinarily, fluctuations in value during the process of governmental decisionmaking are considered "incidents of ownership." See Agins v. City of Tiburon, supra, 447 US at 263, n. 9.

In his dissenting opinion in San Diego Gas, supra, 450 US at 656-57, Justice Brennan suggested that it would only be "fair" for the public to pay "just compensation" in order to place the landowner affected by an invalid regulation in the same position he would otherwise have occupied. To hold that someone who invests capital in real property can recover losses occasioned by the application of

land-use regulations to his property would effect a fundamental shift in the allocation of risk in capital ventures. The local government and its taxpayers cannot assume the burden of making disappointed landowners whole. As this Court noted in Andrus v. Allard, *supra*, government regulation often "curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." 444 US at 65 (emphasis in original).

A cogent statement against the award of compensation to owners of property affected by invalid municipal zoning ordinances was made in Veling v. Borough of Ramsey, 94 NJ Sup. 459, 228 A2d 873 (1967). In holding that no cause of action to recover damages could be maintained against a municipality, the Court took note of the adverse effect exposure to damages would have on municipal functions and on the public fisc (*id.*, 228 A2d at 874):

The power of a municipality to adopt zoning regulations pursuant to statutory authority is an essential aspect of the police power. The governing body must be free to exercise that power in good faith to amend or alter its zoning regulations when it determines the public interest requires. To hold otherwise would saddle municipalities with oppressive financial burdens and litigation which would seriously impair, if not nullify, their power to perform a vital governmental function.

Accord, HFH, Ltd. v. Superior Court of Los Angeles County, 125 Cal. Repr. 365, 542 P2d 237, 242-43 (1975), cert. denied, 425 US 904 (1976); Superior Uptown Inc. v. City of Cleveland, 39 Ohio St. 2d 36, 313 NE2d 820 (1974); Mailman Development Corp. v. City of Hollywood, 286 So.2d 614, 615 (Dist. Ct. App. Fla., 1973), cert. denied, 293 So.2d 717 (Sup. Ct., Fla.), cert. denied, 419 US 844 (1974) (all holding that no cause of action for money damages could be maintained against a municipality for the diminution in value of land resulting from the application of invalid zoning ordinances).

Similarly, the Supreme Court of North Dakota declined to award damages where there had been a

reduction in the market value of property through zoning. In Eck v. City of Bismarek, supra, 283 NW2d at 200-01, the Court found that municipal liability in damages for the effects of unconstitutional land-use regulations would have grave consequences:

We agree that the potential consequences of an action for inverse condemnation militate against its availability to challenge the constitutionality of governmental regulation. If actions for inverse condemnation loom in the future, land-use planning might be stymied, the fiscal-buogetary process chaotic, and the financial burdens on the community staggering. Most important, authorization of such an action would enable North Dakota courts to sit as legislative bodies doling out the State and local fisc.

See also Brabham v. City of Sumter, 275 So. C. 597, 274 SE2d 297 (S.C. Sup. Ct., 1981); Mountain Medical, Inc. v. City of Colorado Springs, 43 Colo. A. 391, 608 P.2d 821 (Colo. Ct. App., 1979); Davis v. Pima County, 121 Ariz. 343, 590 P2 459 (Ct. App., 1978); State of Washington v. Pacesetter Construction Co., Inc., 89 Wash. 2d 203, 571 P2d 196 (Sup. Ct., 1977); Joyce v. City of Portland, 24 Ore.

A. 689, 546 P2d 1100 (Ore. Ct. App., 1976) (all holding that a property owner has no entitlement to money damages from the state or local government for losses occasioned by changes in zoning).

For all the above reasons, we urge this Court to find that there has been no official action interfering with respondent's use of the land sufficient to constitute a compensable taking.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

November 14, 1984.

Respectfully submitted,

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No. 84-4

In the Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, ET AL., PETITIONERS

v.

HAMILTON BANK OF JOHNSON CITY

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS**

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QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether, under this Court's decision in *Parratt v. Taylor*, 451 U.S. 527 (1981), respondent's claim that its property was taken without just compensation in violation of the Fifth and Fourteenth Amendments should have been dismissed because respondent did not pursue procedures under state law to obtain compensation or show that those procedures are inadequate.

2. Whether respondent's claim of an unconstitutional taking, based on the disapproval by petitioner Planning Commission of a particular preliminary plat for development of a residential subdivision, was ripe for adjudication, despite respondent's failure to revise its proposal in light of the Commission's concerns, to request a variance, or to seek judicial review of the disapproval in state court.

3. Whether, if the taking claim was ripe for adjudication, the Commission's disapproval of the particular preliminary plat constituted a taking, even though the zoning ordinance, subdivision regulations, and other factors relied upon by the Commission advanced legitimate state interests and did not foreclose substantial development of the tract.

4. Whether, in light of the district court's holding that the Commission's actions were not authorized by state law, the Commission's disapproval of the preliminary plat gives rise to a claim for just compensation.

5. Whether, if the Commission's application of the current zoning ordinance and subdivision regulations to respondent's land on a permanent basis would have constituted a taking, the temporary application of those provisions until the district court enjoined the Commission from relying upon them in considering future proposals by respondent also must be regarded as a taking, that requires the payment of compensation.

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*ON WRIT OF CERTIORARI TO THE UNITED STATES
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**BRIEF FOR THE UNITED STATES
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INTEREST OF THE UNITED STATES

This case raises important questions concerning the circumstances in which the government may be required to pay compensation for the enforcement of a regulatory measure that is held to constitute a "taking" of property. It therefore may have an impact on the administration of federal regulatory programs affecting land use. See note 12, *infra*.

STATEMENT

1. a. Under the laws of Tennessee, the legislative body of a county is authorized to adopt a zoning ordinance to regulate the location and dimension of buildings, the density and distribution of population, and the uses of buildings and land for "trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation or other purposes." Tenn. Code Ann.

§ 13-7-101 (1980). Such an ordinance must be designed "for the purpose of promoting the health, safety, morals, convenience, order, prosperity and welfare of the present and future inhabitants of the state and of its counties" (*id.* § 13-7-103). The board of zoning appeals may grant a variance where strict application of the ordinance to a parcel of land having unusual topographical or other conditions would "result in peculiar and exceptional practical difficulties" or would cause "exceptional and undue hardship upon the owner," if such relief may be granted "without substantial detriment to the public good and without substantially impairing the intent and purpose of the zone plan and zoning ordinances." *Id.* § 13-7-109.

b. Tennessee law also provides for the establishment of regional planning commissions, which are charged with formulating comprehensive development plans. Tenn. Code Ann. §§ 13-1-106, 13-3-401 *et seq.* (1980). Petitioner Williamson County Regional Planning Commission is one such commission. No plat of a subdivision of land within a county may be recorded until it has been approved by the responsible planning commission. *Id.* § 13-3-402. In exercising that responsibility, the planning commission must provide for the "harmonious development of the region and its environs," the "coordination of roads within the subdivided plat," "adequate open spaces," "adequate transportation, water, drainage and sanitary facilities," "avoidance of population congestion," and avoidance of such "scattered or premature subdivision of land as would involve danger or injury to health, safety or prosperity" (*id.* § 13-3-403). The commission also may specify the manner in which roads must be graded or improved and utility and other facilities must be installed "as a condition precedent to the approval of the plat." *Ibid.*

In 1973, when the residential subdivision at issue in this case was first proposed, the Williamson County Regional Planning Commission followed a two-step procedure for review and approval of a subdivision plat (C.A. App. 870). The initial step involved the preparation and submission of a "preliminary sketch plat" showing, inter

alia, the current zoning classification, the contour of the land, existing and proposed roads, and property lines, buildings, utility lines, and open space (*id.* at 871). If the preliminary plat was approved, the developer then could proceed to the preparation of the more formal and detailed final plat (*id.* at 870, 872). The regulations expressly provided, however, that the approval of a preliminary plat "will not constitute acceptance of the final plat" and that approval of a preliminary plat would lapse unless a final plat based on it was submitted within one year or the Commission granted an extension (*id.* at 872).

In order to be approved, the plat was required to conform to the substantive terms of the zoning ordinance and the subdivision regulations governing such features as the location, width and grade of streets; arrangement and minimum size of lots; building setbacks; and suitability of the land for development (C.A. App. 876-893, 897). However, the Commission was authorized to grant a variance where "unnecessary hardship" otherwise would result or where, "because of topographical or other conditions peculiar to the site," a departure could be made without destroying the intent of the regulations (*id.* at 887).

2. a. In 1973, respondent's predecessor in interest—the developer of the residential subdivision known as Temple Hills Country Club Estates—submitted to the Williamson County Regional Planning Commission a preliminary plat for "cluster" residential development of its tract. Then, as now, the zoning ordinance for the County permitted such "cluster" development, under which houses could be built on relatively small lots if other land in the tract was kept as open space (Pet. App. 3a-4a; C.A. App. 857-860). However, the density of the overall development could be no greater than that permitted under the County's zoning ordinance (in this case, one unit per acre), computed on the basis of the total acreage in the tract less one-half of all land lying on a slope having a grade in excess of 25%. In addition, clustered units could not be built on

any particular parcel that was on a steep slope or was otherwise unbuildable (C.A. App. 858).

The Commission approved the developer's preliminary plat for Temple Hills in May 1973 (J.A. 246-247). The plat showed a total project area of 676 acres, of which 416 acres eventually would be developed for residential use and 260 acres would be dedicated as open space, primarily in the form of a 245-acre golf course. Although the plat bore a notation stating that the number of "allowable dwelling units for total development" was 736,¹ the plat actually showed lot lines for only 469 units on 287 of the 416 acres that were designated for residential development. The remaining 129 acres, on which no lot lines were drawn, were labeled "not to be developed until approved by the Planning Commission." In June 1974 and June 1975, the preliminary plat for Temple Hills was revised slightly and reapproved (J.A. 270, 272, 362). The owners sought and obtained approval of a final plat for each section of the overall tract only when they were ready to proceed with that section. Final plats apparently were approved for several such sections in 1973, 1974 and 1975 (J.A. 272, 277-278, 295-296). Because of various economic problems, however, development of Temple Hills faltered during 1976 and 1977, and the preliminary plat was not reapproved during that period (J.A. 274-275, 295-296).

In October 1977, Williamson County amended its zoning ordinance. The 1977 ordinance retained the prior density standard of one unit per acre, the exclusion of one-half of the acreage having a grade of more than 25%, and the prohibition against building units on any steeply sloped parcel (J.A. 417). It also added a new requirement that in calculating the number of allowable units, 10% of the total acreage must be deducted as attributable to roads and utilities (*ibid.*). In 1978, the

¹ The total number of allowable units exceeded the total number of acres because the term "acre" was defined as 40,000 square feet, although a standard acre contains 43,500 square feet (J.A. 362).

developer of Temple Hills obtained approval of a preliminary plat that was essentially similar to the one approved in 1973 (J.A. 274), and that plat was again approved for one year in August 1979 (*id.* at 278-281, 296, 362).

b. By 1980, final plats covering 212 lots had been approved by the Commission and the 245-acre golf course had been set aside as open space (J.A. 296, 362). In October of that year, the developer again submitted a preliminary sketch plat for Temple Hills that provided for a total of 736 units, including the 212 lots previously given final approval. This time the Commission disapproved the submission (J.A. 297-298). Although the Commission had adopted amended subdivision regulations in June 1980,² the disapproval was not based on those new regulations. Rather, the minutes of the Commission's meeting state that the "plan as presented" was disapproved on three grounds: (1) there was no deduction for 10% of the acreage attributable to roads or one-half of the land having a slope of more than 25%; (2) approximately 18.5 acres that had been taken by eminent domain for a parkway were not excluded in calculating the number of units; and (3) individual lots were located on slopes of more than the 25% (*ibid.*). The Commission's staff had estimated that these restrictions would reduce the number of allowable units on the entire tract from 736 to 548 (J.A. 304), thereby permitting 336 additional units.³

² The new regulations increased the minimum lot size from 9,000 square feet to 1/2 acre and minimum lot width from 75 to 125 feet (C.A. App. 884, 940). The 1980 regulations also provided that the Commission could issue variances where "strict adherence to [the] regulations would cause unnecessary hardship" (C.A. App. 932-933).

³ The Commission's staff had recommended disapproval on several additional grounds, including (1) failure to conform to 1980 subdivision regulations pertaining to the length of cul-de-sacs, road grades, minimum lot size, and road frontage; (2) inadequacy of the main access road; and (3) failure to provide adequate fire protection service and recreational facilities (J.A. 304-305). How-

c. In November 1980, respondent acquired, through foreclosure, the 258 acres of the Temple Hills tract that had not yet been developed and sold (Pet. App. 5a; Tr. 791-792).⁴ In June 1981, respondent submitted a preliminary plat that was similar to the developer's proposal

ever, a committee that had been appointed by the Commission to assist the developer in designing a suitable plat for Temple Hills had recommended waiver of the cul-de-sac, road grade, minimum lot, and road frontage requirements (*id.* at 297, 305-306).

⁴ Respondent's association with the Temple Hills project has a complicated history. In 1973, the joint venture that was formed to develop Temple Hills obtained an \$8 million loan that was arranged by the Hamilton Mortgage Corp., which, along with respondent, was a subsidiary of Hamilton Bankshares, a holding company. Respondent participated in the loan in the amount of \$900,000 (Tr. 774-779).

In February 1976, Hamilton Bankshares, its mortgage subsidiary, and another subsidiary bank that had participated in the loan to the Temple Hills developers all became insolvent, but respondent did not (Tr. 777, 780, 782). In July 1976, respondent was acquired by Ancorp Bankshares, another holding company (Tr. 781). Ancorp identified respondent's participation in the Temple Hills loan as one of several "problem loans" (Tr. 774). Nevertheless, through a complicated series of transactions involving the trustee in bankruptcy of the mortgage subsidiary and the Federal Deposit Insurance Corporation (which was liquidating the other banking subsidiary), Ancorp caused respondent to acquire a 100% interest in the Temple Hills project in return for giving up its interest in a development in Hilton Head, on which the same three parties had foreclosed following default on a loan (Tr. 782-784). To acquire that interest, respondent paid the FDIC \$1.8 million and gave up its \$900,000 interest in the Hilton Head project, leaving respondent with a total stake in the Temple Hills project of \$3.6 million (Tr. 784-785). Respondent in turn sold the Temple Hills property to Jim Patterson, one of the original developers, for \$3.6 million, receiving \$1.2 million in cash and a note for the balance of \$2.4 million (Tr. 785-787). Patterson then sold the golf course to satisfy other indebtedness on the Temple Hills project (Tr. 787). Although 60 houses were built on the tract in 1978, the project slowed down after that date when the economy worsened and Patterson experienced financial difficulties (Tr. 790). Respondent foreclosed on the mortgage and purchased the 258 acres at a sheriff's sale on November 26, 1980, for \$1.75 million (Tr. 796). The balance owed by Patterson (including accrued interest) at the time of the foreclosure was \$2.87 million (Tr. 793).

that had been rejected by the Commission in October 1980. The Commission again declined to approve the plat, relying in part on the same density and slope restrictions it had cited on the prior occasion.⁵ In addition, the Commission explained that two cul-de-sacs were 3,000 and 5,000 feet in length, well in excess of the 800-foot maximum under the subdivision regulations (C.A. App. 945); road grades exceeded the maximum allowed under county road regulations; the main access road for the development (Temple Road) had deteriorated and could not handle the traffic that would be generated; there was confusion over responsibility for installing underground electrical cables; inadequate provisions were made for fire protection, recreational facilities, and open space for multi-family housing; and the plat failed to comply with minimum lot size and frontage requirements in the 1980 subdivision regulations (*ibid.*).

3. Respondent then filed this suit in the United States District Court for the Middle District of Tennessee seeking damages and injunctive relief against the Commission under 42 U.S.C. 1983, based on an alleged taking of its property in violation of the Fourteenth Amendment, and under the state common law of estoppel (Pet. App. 5a).⁶

⁵ Representatives of respondent had appeared at the November 11, 1980 meeting of the Williamson County Board of Zoning Appeals, seeking a ruling that respondent was entitled to develop Temple Hills under the zoning ordinance in effect in 1973 rather than that adopted in 1977 (J.A. 310-330). The Board ruled in respondent's favor, apparently on the ground that the prior approval of its preliminary plats rendered its entire proposal, even though only partially developed, a nonconforming use (*id.* at 328). However, the Planning Commission declined to follow that ruling on the ground that the Board did not have jurisdiction to resolve such a general question of law (J.A. 361; Tr. 187-188, 812)—a position that subsequently was endorsed by an opinion of the Attorney General of Tennessee (No. 80-581 (Dec. 1, 1980)).

⁶ Respondent's claims of a deprivation of equal protection and procedural and substantive due process were rejected either by the court or the jury (Pet. App. 4a-5a) and are not at issue here.

Respondent's coordinator for the Temple Hills project testified at trial that, in his view, only 67 lots could be developed on the remaining 258 acres in the Temple Hills tract under the zoning ordinance and planning regulations in effect in 1980 and under the conditions set forth in the Commission's June 1981 letter disapproving the preliminary plat (J.A. 101-104; Tr. 238-243). However, the county engineer testified that respondent would be permitted to develop nearly 300 additional lots (Tr. 1467-1468). The jury found that respondent had been deprived of the economically viable use of its land and that the Commission therefore had unconstitutionally taken respondent's property (Tr. 2015-2016, 2022-2027). The jury also found that the Commission was estopped under state law from applying the present zoning regulations, rather than the 1973 regulations, to the Temple Hills development (Tr. 2016-2018, 2022, 2027). In light of the jury's estoppel verdict, the district court enjoined further application of post-1973 regulations to Temple Hills (Pet. App. 29a-30a).

The jury then awarded \$350,000 in damages for a "taking" of the property from the time the Commission applied the 1980 regulations to respondent's land until the date of the jury's estoppel verdict (Pet. App. 5a-6a; Tr. 2040-2043, 2055, 2058), but the district court granted the Commission's motion for judgment notwithstanding the verdict (Pet. App. 23a). The court reasoned that in light of the jury's estoppel verdict, there had been only a temporary interference with respondent's property. The court concluded that this effect did not constitute a taking for which compensation was required, especially since "[a]ny damages which [respondent] suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law" (Pet. App. 26a).

In March 1983, while cross-appeals were pending, the Commission approved a modified preliminary plat submitted by respondents (see Pet. 8). We understand that

this approval was part of a settlement agreement between the parties on the estoppel issue, under which the Commission would permit respondent to develop 476 additional units and grant variances from the 1973 regulations for certain cul-de-sacs and road grades, and respondent would resurface Temple Road, adhere to the 1980 standards in building additional roads, and avoid locating lots on unsuitable soils. See Planning Comm'n Minutes, Exh. 1 (Sept. 8, 1983).

4. Respondent nonetheless pursued its appeal, and a divided court of appeals reinstated the award of damages (Pet. App. 1a-22a). The majority found sufficient evidence to support the jury's verdict that the 258 acres "had no remaining economically viable use" in light of the Commission's actions (Pet. App. 9a-10a). The majority also found sufficient evidence to support the jury's estoppel verdict and thus to support the conclusion that the Commission had destroyed respondent's reasonable investment-backed expectations (Pet. App. 10a-12a). On this basis, the majority held that respondent was entitled to compensation for a "temporary taking" of its property between October 1980 and the date of trial 18 months later (Pet. App. 12a-15a).

Judge Wellford dissented (Pet. App. 16a-22a). He concluded that the evidence did not establish that petitioner had been denied economically viable use of its land, especially because there was no evidence that respondent had requested a variance and because it was "virtually conceded" that, even under current standards, a total of 548 units would be approved for the Temple Hills tract (*id.* at 16a-17a). He further concluded, however, that, the temporary interference with respondent's expectations did not constitute a taking, particularly since the Commission had determined that respondent was not even in compliance with some restrictions that were contained in the 1973 regulations (*id.* at 17a-20a).

INTRODUCTION AND SUMMARY OF ARGUMENT

There is a fundamental defect in the proceedings in this case that seems not to have been addressed by the courts below. The court of appeals reinstated an award of damages for an unlawful "taking" of respondent's property. Yet the Constitution does not prohibit the government from taking private property; to the contrary, the power to do so is an essential attribute of sovereignty. The Fifth Amendment, which is applicable to the States through the Fourteenth Amendment,⁷ provides only that private property shall not be taken for public use "without just compensation." Compare *Parratt v. Taylor*, 451 U.S. 527, 537 (1981). Nor does the Constitution require that compensation precede the taking; it is sufficient if there is a procedure pursuant to which the person deprived of his property may thereafter recover compensation. *Hurlcy v. Kincaid*, 285 U.S. 95, 104 (1932); *Ruckelshaus v. Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 28. Only where a State has not provided such a post-taking procedure (or where that procedure is inadequate) has the State violated the constitutional prohibition against the taking of property without just compensation, and only then may a federal court entertain a suit to remedy the alleged constitutional violation. Compare *Parratt v. Taylor*, *supra*; *Hudson v. Palmer*, No. 82-1630 (July 3, 1984), slip op. 12-18; *id.* at 3-5 (O'Connor, J., concurring); *id.* at 2 n.4 (Stevens, J., concurring and dissenting). See *Dohany v. Rogers*, 281 U.S. 362, 366-368 (1930). To ignore this principle "would make of the Fourteenth Amendment a font of [land use law and remedies] to be superimposed upon whatever systems may already be administered by the States." *Parratt v. Taylor*, 451 U.S. at 544, quoting *Paul v. Davis*, 424 U.S. 693, 701 (1976).

In this case, the Tennessee Constitution provides that no property shall be taken or applied to public use "without just compensation being made therefor." Art. I, § 21.

⁷ *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226, 239 (1897).

To implement this guarantee, state law permits a landowner to bring an action to recover compensation for a taking that already has occurred (Tenn. Code Ann. § 29-16-123 (1980)), and the Tennessee Court of Appeals has stated that "[i]t is possible to recover in inverse condemnation for unreasonable restriction of the use of property by enactment of a zoning law." *Davis v. Metropolitan Gov't, of Nashville*, 620 S.W.2d 532, 534 (1981); cf. *Land Associates v. Metropolitan Airport Authority*, 547 F. Supp. 1128, 1131 (M.D. Tenn. 1982), *aff'd*, 712 F.2d 248 (6th Cir. 1983). Because respondent apparently has never sought compensation under this procedure or shown that it does not afford an adequate remedy (compare *Agins v. City of Tiburon*, 447 U.S. 255, 259 (1980)), the courts below erred in entertaining respondent's suit under 42 U.S.C. 1983 seeking relief for an allegedly unconstitutional taking. See *Suess Builders Co. v. City of Beaverton*, 656 P.2d 306, 313-314 (Or. 1982).

A. Quite aside from the defect just discussed, the court of appeals in this case countenanced a wholly unwarranted and peremptory intrusion by the federal courts into the orderly administration of the zoning and land use laws of the States and their local governments. The district court, affirmed by the court of appeals, entertained respondent's suit contending that the Planning Commission's disapproval of a particular preliminary plat had resulted in a taking of its property, even though respondent had failed to develop an alternative proposal in an effort to accommodate the Commission's concerns, failed to pursue applicable variance procedures that are designed to alleviate hardships, and failed to seek judicial review in state court. There accordingly was no indication that the State had finally and permanently barred all substantial development on respondent's tract, such that its actions could be said to have ripened into a concrete "taking."

B. The court of appeals' conclusion that a "taking" had occurred in this case by virtue of the Commission's application of reasonable zoning regulations and related

restrictions that plainly permitted substantial residential development on the remaining portions of the Temple Hills tract is flatly inconsistent with this Court's repeated recognition of the central role of zoning and other land use restrictions in promoting public health and safety and the general welfare of the community. There was no physical invasion of respondent's premises, no substantial change in governing regulations, no uniquely harsh impact on respondent, and no interference with reasonable investment-backed expectations on respondent's part that it would be permitted to develop additional lots without regard to the regulations in effect when it sought final approval.

C. Because the court of appeals was clearly incorrect that the regulations and other restrictions respondent challenged would have resulted in a taking if they had been made permanently applicable to respondent's land, it is clear that no taking occurred during the limited period that elapsed until the district court held that the Commission was barred by state law from applying the post-1973 regulations to Temple Hills. In any event, because the district court held that the Commission's actions were not authorized by state law, those actions cannot give rise to a claim for just compensation.

ARGUMENT

A. THE COMMISSION'S ACTIONS DID NOT RIPEN INTO A FINAL DISAPPROVAL BY THE STATE THAT COULD CONSTITUTE A "TAKING" OF PRIVATE PROPERTY

After the Planning Commission declined to approve the preliminary plat respondent submitted in June 1981, respondent did not revise its submission in an effort to meet the Commission's concerns, did not request a variance, and did not seek judicial review in state court. Respondent instead immediately brought this action in federal district court alleging that the Commission's action resulted in a taking of its property in violation of the Federal Constitution. The constitutional claim was not ripe, however, because as a result of respondent's failure

to pursue available procedures under state law, there had been no final action by the State barring the development of respondent's land that in turn could properly be regarded as a "taking" of respondent's property.

1. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court held that the mere enactment of the zoning ordinances under review did not constitute a taking of the appellants' property, because they might have been permitted under those ordinances to build as many as five houses on their five-acre parcel. The Court further held that "[b]ecause the appellants [had] not submitted a plan for development of their property as the ordinances permit[ted], there [was] as yet no concrete controversy regarding the application of the specific zoning provisions." 447 U.S. at 260. As petitioner contends (Pet. 13-14), this case is in essentially the same posture.

To be sure, respondent, unlike the appellants in *Agins*, did submit a preliminary plat to the Commission in June 1981, and the Commission declined to approve that plat. But the Commission did not suggest that it intended to bar all or substantially all further development on the remaining 258 acres of the Temple Hills tract, such that it would be futile for respondent to submit a revised proposal. To the contrary, the County Engineer testified at trial that the zoning ordinance and subdivision regulations would have permitted almost 300 additional units to be built (Tr. 1467-1468). In these circumstances, it was incumbent upon respondent, before suing to recover for an allegedly unlawful taking, to revise its proposal and to cooperate in good faith with the Commission in an effort to reach a mutually satisfactory accommodation. In that process, the Commission would have had an opportunity to correct its own errors, to apply its experience and expertise, to reach a deliberate and conclusive judgment regarding the precise extent to which it would permit development on the tract, and to develop a more complete record to inform the judgment of a court that might review its actions under state law or make the essentially "ad hoc, factual inquiries" required in consid-

ering a taking claim. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295 (1981); cf. *Weinberger v. Salfi*, 422 U.S. 749, 765-766 (1975). Only then would the Commission's decision applying the governing regulations to the particular parcel have had sufficient formality, concreteness and finality to be regarded as an actual "taking" of property by the State, as distinguished from an interlocutory ruling or informal action in the administration of a regulatory program that could not properly give rise to a claim for monetary relief. Cf. *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, No. 82-1349 (June 19, 1984), slip op. 10-12.

2. Respondent not only failed to revise its submission to meet the objections of the Commission within the limitations imposed by the zoning ordinance and subdivision regulations in effect in 1981; it also failed to seek a variance from the application of those limitations. The Board of Zoning Appeals was authorized to grant a variance where unusual topographical conditions created "exceptional practical difficulties" or "exceptional and undue hardship," if it could do so "without substantially impairing the public good" (Tenn. Code Ann. § 13-7-109 (1980)). The Commission likewise was authorized to grant a variance from its regulations in cases involving undue hardship or special topographical features (C.A. App. 932-933). It therefore was possible that respondent could have obtained a relaxation of the provisions governing density, sloping, minimum lot size, frontage, road grades, and cul-de-sac lengths to the extent necessary to permit respondent to develop what it regarded as a financially feasible package.⁸

⁸ Such a request might well have been fruitful, at least in some respects. A committee appointed by the Commission to assist the developer to prepare a suitable proposal for Temple Hills in October 1980 had recommended waiver of the cul-de-sac, road grade, minimum lot, and road frontage requirements of the 1980 subdivision regulations. See note 3, *supra*.

The hardship and topographical exceptions permitted under the variance procedures are responsive to the very concerns respondent has raised in connection with its taking claim in this case, and, by the same token, they afford the Commission and the County an opportunity to avoid such a taking and any monetary liability it might impose. Under essentially identical circumstances, the Court in *Virginia Surface Mining* held that the landowners' taking challenge to particular provisions of the Surface Mining Act was not ripe because they might obtain administrative relief by seeking a variance. See 452 U.S. at 297.⁹ The decision in *Virginia Surface Mining*, like that in *Agins*, therefore required the district court to dismiss respondent's taking claim on ripeness grounds. See also *Ruckelshaus v. Monsanto Co.*, No. 83-196 (June 26, 1984), slip op. 24, 29, 30-31; *Dames & Moore v. Regan*, 453 U.S. 654, 689 (1981); Pet. App. 16a-17a (Wellford, J., dissenting).

Of course, in March 1983, after the district court entered its judgment, the Commission did approve a preliminary plat for 476 additional units as part of a settlement of respondent's estoppel claim.¹⁰ Because respondent's taking claim was not ripe prior to that date and because it then was rendered moot by the Commission's approval of a preliminary plat permitting substantial

⁹ See Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. Law. 447, 473 (1983) (footnotes and emphasis omitted):

The time of "taking" generally is never to be determined from the date of publication of a plan or enactment of a regulation. As of that time and until the landowner applies for a variance, a building permit, or other similar license from the appropriate board and has been denied, there has been no harm done. Harm cannot be determined until the regulation is applied to the individual.

See also *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1201 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

¹⁰ In doing so, the Commission granted respondent variances for certain cul-de-sac and road grades. See pages 8-9, *supra*.

development, there is not now and never has been a justiciable "taking" issue in this case.

3. The viability of respondent's taking claim in federal court is further undermined by respondent's failure to seek judicial review in state court of the Commission's disapproval of its preliminary plat in June 1981. If, as appears, there was an available state procedure for obtaining such review,¹¹ then the Commission's decision did not under state law constitute a final rejection by the State of respondent's claim of a right to develop its property in conformity with its submission. Under the principles of *Agins* and *Virginia Surface Mining*, just discussed, there was no ripe taking claim for this additional reason as well.

Pursuit of available state judicial remedies in these circumstances would have afforded the state courts an opportunity to construe and apply state law and regulations in light of respondent's constitutional contentions, perhaps "thereby obviating any need to address the constitutional questions" (*Virginia Surface Mining*, 452 U.S. at 297 (footnote omitted)), or to grant relief on constitutional grounds. See *City of Eastlake v. Forest City Enterprises*, 426 U.S. 668, 677 (1976). Moreover, if the state court had held the Commission's action invalid on state law grounds, respondent's taking claim would have been moot, since agency action that is unauthorized by law cannot give rise to a claim for just compensation. See *Ruckelshaus v. Monsanto Co.*, slip op. 27; *Dames & Moore v. Regan*, 453 U.S. at 688; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 127 n.16 (1974); *Yearsley v. Ross Construction Co.*, 309 U.S. 18, 21 (1940); *Hoe v. United States*, 218 U.S. 322, 336 (1910). Cf. *Virginia Surface Mining*, 452 U.S. at 296 n.37. And in fact the

¹¹ Tennessee courts may review arbitrary zoning action by a governmental body by means of the common law writ of certiorari. See Tenn. Code Ann. § 27-9-101 (1980); *Brooks v. City of Memphis*, 192 Tenn. 371, 241 S.W.2d 432 (1951); *Land Associates v. Metropolitan Airport Authority*, 547 F. Supp. 1128, 1133 (M.D. Tenn. 1982), aff'd, 712 F.2d 248 (6th Cir. 1983).

district court in this case held that the Commission's actions were not authorized by state law, thereby removing any basis for a claim of just compensation. See page 8, *supra*, and pages 27-28, *infra*.¹²

¹² The principles we have discussed in the text are not simply ones of federalism. They go to the question whether there even has been a taking of private property within the meaning of the Fifth Amendment. Accordingly, as the Court's decision in *Virginia Surface Mining* makes clear, those principles are equally applicable to claims that a federal statute or regulation would result in a taking if applied to particular property. Many federal programs provide for the granting of licenses, permits, or variances. Often there are established procedures for administrative review of a denial of an application, and judicial review typically is available either under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, or under a special statutory review procedure. The orderly administration of these programs would be undermined if a person subject to regulation under them could ignore established procedures for direct review of interlocutory or final agency action and instead bring a taking claim in federal court, whether in the form of an action for injunctive or declaratory relief or a suit under the Tucker Act seeking just compensation.

For example, the prohibition in Section 522(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1272(e), against any surface coal mining in certain areas is made subject to "valid existing rights." See *Virginia Surface Mining*, 452 U.S. at 296 & n.37. The Department of the Interior has construed that exception as embodying a congressional intent that the prohibition in Section 522(e) does not apply where it would result in a taking that would require the payment of compensation under the Fifth Amendment. A person seeking to mine in such an area must seek an administrative determination by the Interior Department as to whether he has a "valid existing right," and that administrative decision is subject to judicial review. See 48 Fed. Reg. 41313-41314 (1983). Thus, it is particularly clear under this statutory scheme that the denial of a mining permit on such land cannot give rise to a claim for just compensation because, under the Secretary's construction, Congress has not authorized the denial of a permit that would constitute a taking. The person claiming a right to mine on the land therefore must pursue his administrative remedies and seek judicial review of an adverse administrative determination; he has no taking claim as such.

This same rationale would apply in the administration of any statute in which Congress did not authorize the agency to engage in action that would constitute a taking and thereby give rise to a

B. THE PLANNING COMMISSION'S ACTIONS IN 1980, EVEN IF THEY HAD NOT BEEN MODIFIED BY THE DISTRICT COURT'S ESTOPPEL RULING, DID NOT EFFECT A "TAKING" OF RESPONDENT'S PROPERTY

If, contrary to our submission in Point A, the "taking" issue in this case is ripe for resolution, the court of appeals' holding that the Planning Commission's actions accomplished a taking of respondent's property for which the Constitution requires the payment of compensation should be reversed. That holding is flatly inconsistent with this Court's decisions.

The Court need not be detained here by its threshold admonition in other cases that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests" (*Agins v. City of Tiburon*, 447 U.S. at 260). As the court of appeals conceded (Pet. App. 6a), the Williamson County zoning ordinance and subdivision regulations in effect in 1980 clearly advanced legitimate state interests. Here, as in *Agins*, the density limitations further the important interest of preserving open space and thereby "protect[ing] the residents * * * from the ill effects of urbanization" (447 U.S. at 261 (footnote omitted)). Similarly, the prohibition against building on steeply sloped lands respects the integrity of the natural

claim for just compensation. This is but another aspect of the question, discussed in *Ruckelshaus v. Monsanto Co.*, slip op. 27, of whether Congress intended for there to be a Tucker Act remedy in the particular case. Where Congress has not authorized a Tucker Act remedy in connection with a regulatory program administered by a federal agency under broad discretionary standards, it may often be because Congress did not want the public to subsidize the adjustment of benefits and burdens of private persons and therefore did not authorize the agency to apply the statute in circumstances that would constitute a taking and give rise to a claim for monetary compensation. In those circumstances, the court may enjoin the operation of the statute or agency action to the extent it constitutes a taking, not only because a Tucker Act remedy is not available, but also because Congress did not intend for the statutory restrictions to be applied in that manner.

terrain as an aesthetic matter, protects public health and safety, and helps to retain soil, vegetation and water on the slope. Cf. *Virginia Surface Mining*, 452 U.S. at 283-284 & n.22. See *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962). The other objections in the Planning Commission's June 1981 letter (see pages 6-7, *supra*) also clearly served legitimate state interests.

The question, then, is whether the County's pursuit of these concededly valid objectives by enforcement of its zoning ordinance and subdivision regulations nevertheless constituted a taking. "[T]his Court has generally 'been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action' must be deemed a comper taking." *Kaiser Aetna v. United States*, 444 U.S. 175 (1979), quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). The Court instead has considered a number of factors that fall into three general categories: (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation," and (3) the extent to which there has been an interference with "distinct investment-backed expectations" (*Penn Central*, 438 U.S. at 124).

1. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government" (*Penn Central*, 438 U.S. at 124, citing *United States v. Causby*, 328 U.S. 256 (1946)) "than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good" (438 U.S. at 124). See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 437, 440-441 (1982). The zoning ordinance and subdivision regulations at issue here obviously fall in the latter category.

In addition, the Court has attached significance in the area of land-use regulation to whether the statutory program imposes restrictions on a number of parcels and thereby enables the owner of any particular parcel to

share in the benefits as well as the burdens of the exercise of governmental power. *Agins v. City of Tiburon*, 447 U.S. at 262; *Penn Central*, 438 U.S. at 131, 134-135; *id.* at 139-140 (Rehnquist, J., dissenting). In this case, as in *Agins* (447 U.S. at 262), there is no indication that respondent's tract is the only property in the County affected by the regulations. Compare *Virginia Surface Mining*, 452 U.S. at 281-282. Moreover, while respondent's interest as the developer of the 258-acre tract is largely transitory, the competing interests may extend for generations to come. Governmental regulation of the development of vacant land protects the distinct interests of the individuals who will make their homes there after the developer has wound up its affairs and assures that the often irreversible transformation of farms, woods, and wetlands will not have an unduly adverse impact on natural resources, adjacent landowners, and the community at large. See 452 U.S. at 277-280; *Hodel v. Indiana*, 452 U.S. 314, 325-329, 332-333 (1981).

2. In assessing the second factor—the particularized economic impact of a regulatory program—it is of course necessary to start with the fundamental premise that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law” (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). The court of appeals based its finding of a taking in this case principally on the diminution in the value of the land resulting from application of the zoning ordinance and subdivision regulations in effect in 1980 and the other objections to the preliminary plat stated in the Commission's June 1981 letter (Pet. App. 9a-10a). But where, as here, land-use regulations “are reasonably related to the promotion of the general welfare,” this Court's decisions “uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking’” (*Penn Central*, 438 U.S. at 131). See *e.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v.*

Los Angeles, 239 U.S. 394 (1915) (87½% diminution in value); *City of Eastlake v. Forest City Enterprises*, 426 U.S. at 674 n.8.

The soundness of that rule is especially evident in this case. The passage and enforcement of the zoning ordinance and subdivision regulations did not require respondent to cease any existing use of the land in its unimproved state. Absent substantial indications to the contrary, such unimproved land (and other land as well) is generally held subject to the prospect that reasonable governmental regulation may intervene in a manner that could restrict further development of the land.¹³ Accordingly, “the submission that [respondent] may establish a ‘taking’ simply by showing that [it has] been denied the ability to exploit a property interest that [it] heretofore had believed was available * * * is quite simply untenable.” *Penn Central*, 438 U.S. at 130.¹⁴

¹³ The prospect that regulation may inhibit economic development of a tract is all the more evident if the land was acquired or retained for a substantial period of time while it was subject to a regulatory program that imposed special restrictions on its use or the exploitation of its resources. A finding of a taking by virtue of that very governmental regulation would be especially unwarranted in such circumstances. The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, and the wetlands and other activities of the Corps of Engineers under Section 404 of the Clean Water Act of 1977, 33 U.S.C. 1344, are examples of comprehensive federal regulatory programs that may affect a landowner's expectations regarding the extent and manner in which he may develop his land.

¹⁴ The court of appeals' consideration of the zoning ordinance and regulations was further flawed because it focused only on 258 of the 676 acres in the Temple Hills tract. As respondent has insisted, the development of Temple Hills must be viewed as a single project. Of the original 676 acres, 250 already have been developed as a country club/golf course and additional land has been devoted to 212 lots for housing. By focusing only on that portion of the development that has not yet been sold off, the court ignored the requirement that a taking analysis must focus on the “nature and extent of interference with rights in the parcel as a whole.” *Penn Central*, 438 U.S. at 130-131. See also *Deltona Corp. v. United States*, 657 F.2d 1184, 1192-1193 (Ct. Cl. 1981) (no taking where landowner

Moreover, in this case, there was no substantial change in the relevant provisions of the zoning ordinance or subdivision regulations between 1973 and 1981 that could trigger an inquiry into the question of the diminution in the value of respondent's property even if that factor could give rise to a taking. The density and slope restrictions in effect in 1981 were essentially identical to those in effect in 1973. See pages 3-5, *supra*. The only new zoning requirement was that 10% of the acreage, attributable to roads, be deducted in calculating the total number of lots allowed; that deduction did not significantly affect the use of the land for a residential subdivision. Similarly, although subdivision regulations were revised in 1980 to increase the minimum size and road frontage for lots in cluster developments, those provisions did not affect the density permitted on the overall tract under the zoning regulations. And the cul-de-sac restrictions that the Commission applied in 1981 were actually more generous than those in effect in 1973 (C.A. App. 880, 945). Thus, the changes in the applicable regulatory provisions invoked in 1981 do not furnish even a colorable basis for a taking claim.

The court of appeals, in finding that a taking nevertheless occurred by application of the more recent regulations, relied on language in several opinions of this Court stating that application of a general zoning ordinance may effect a taking if it "denies an owner economically viable use of his land" (*Agins v. City of Tiburon*, 447 U.S. at 260; see also *Kirby Forest Industries v. United States*, No. 82-1994 (May 21, 1984); *Virginia Surface Mining*, 452 U.S. at 295-297). The court of appeals reasoned that a taking had occurred in this case because application of the ordinance and regulations in effect in 1981 and the other objections raised by the Commission would mean that respondent would not make a profit—and indeed would experience a substantial loss—

can develop some part of the property but is prohibited from developing another portion consisting of ecologically sensitive wetlands).

if it sought to subdivide and sell the land. On this basis, the court concluded that respondent's 258 acres "had no remaining economically viable use" (Pet. App. 9a-10a (footnote omitted)). The court of appeals plainly misunderstood the meaning of the quoted phrase.

This Court in *Agins* drew the phrase "economically viable use" from a footnote in its opinion in *Penn Central* (see 447 U.S. at 260, citing 438 U.S. at 138 n.36). The latter case involved a challenge to a landmark law that imposed on the owner of Grand Central Terminal an affirmative obligation to keep the building in good repair and to refrain from altering its exterior without city approval. The footnote stressed that the Court's holding that the landmark law did not effect a taking was based on the company's "present ability to use the Terminal for its intended purposes and in a gainful fashion." Then, quoting a concession by counsel during oral argument, the Court simply observed that the company could obtain relief if it showed at some point in the future that "circumstances have so changed that the Terminal ceases to be 'economically viable'" (438 U.S. at 138 n.36).

It is one thing to suggest, as the Court did in *Penn Central*, that the government cannot, without paying just compensation, impose an affirmative and permanent obligation on an ordinary property owner to operate its premises at a loss. It is quite another to conclude, as the court of appeals did in this case, that the government has an affirmative obligation to waive the requirements of reasonable and generally applicable zoning restrictions that actually permit substantial development on the lands to which they apply (and also to waive the minimum standards for roads and the furnishing of other services) in order to enable a particular landowner to proceed with a development that otherwise would be financially unsound because of market conditions, the marginal suitability of the land, or the expense of installing the necessary improvements (cf. *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 75-78 (1980))—and that the govern-

ment must compensate the landowner if it fails to do so.¹⁵ As this Court has said, "loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim." *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

It therefore is clear that the Court did not intend the phrase "economically viable use" in *Agins*, *Virginia Surface Mining* and *Kirby Forest* to suggest that the government must actively promote the ability of a landowner to realize a financial return on his land. See *Park Avenue Towers Associates v. City of New York*, No. 84-7128 (2d Cir. Oct. 12, 1984), slip op. 6641-6645; *William C. Haas & Co. v. San Francisco*, 605 F.2d 1117, 1120-1121 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1980). Rather, the Court was referring to circumstances in which governmental action (not the features of the land itself or the financial or other circumstances of its owner) might work a "radical curtailment of a landowner's freedom to make use of or ability to derive income from his land" (*Kirby Forest*, slip op. 12)—i.e., to affirmative governmental action that drastically interferes with a recognized ability to exploit a substantial economic advantage or other potential use inhering in the property itself, and thereby effectively destroys the owner's interest in the property. Accord, *Virginia Surface Mining*, 452 U.S. at 296. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-415 (1922); cf. *Armstrong v. United States*, 364 U.S. 40, 48 (1960).¹⁶

¹⁵ It is permissible for a locality to limit development that would require the expenditure of substantial public funds for roads and other services (*City of Eastlake v. Forest City Enterprises*, 426 U.S. at 673; *James v. Valtierra*, 402 U.S. 137, 143 n.4 (1971)) or to condition approval upon the agreement of the developer to contribute to the payment, in recognition of the distinct benefit that will be realized by both the developer and the subsequent residents of the subdivision. See, e.g., *Kaiser Aetna*, 444 U.S. at 179. See page 2, *supra*.

¹⁶ See *Penn Central*, 438 U.S. at 127 (perhaps a taking occurs if a restriction "has an unduly harsh impact upon the owner's use of the property"); *Ruckelshaus v. Monsanto Co.*, slip op. 16, quoting

Agins, for example, involved five acres of extremely desirable residential property that allegedly had the highest market value of any land in the community (447 U.S. at 258). A total and permanent prohibition against the building of any houses on such property might well constitute a taking, at least in the absence of weighty countervailing reasons for the restriction. Compare *Miller v. Schoene*, 276 U.S. 272 (1928), with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 414. In this case, however, there plainly was no such "radical curtailment" of an independent economic value.

3. Although as a general matter even a substantial adverse economic impact does not in itself render a regulatory measure a taking, the Court has acknowledged that there might be narrow circumstances in which the unique impact of a statute on a particular property interest "may so frustrate distinct investment-backed expectations as to amount to a 'taking'" (*Penn Central*, 438 U.S. at 127). In order for a taking to be found, however, the expectation must itself partake of a discrete property interest that is externally created or protected by law; "a mere unilateral expectation or an abstract need is not a property interest entitled to protection" (*Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

For example, in *Ruckelshaus v. Monsanto Co.*, the Court relied on an "explicit governmental guarantee" in the applicable statute, the breach of which would "destroy" the manufacturer's competitive edge (slip op. 22-23). But the Court stressed that in the absence of such an "express promise," no protected expectation arose (*id.* at 20). Similarly, in *Kaiser Aetna*, the Court concluded that the linking to navigable waters of a body of water that was private property under state law had given rise to a concrete and protected expectancy in the owner that it would be able to exercise the "fundamental" right to exclude others from the private marina it had

United States v. General Motors Corp., 323 U.S. 373, 378 (1945) (a taking occurs if the action's "effects are so complete as to deprive the owner of all or most of his interest in the subject matter").

created; but the Court so held because the channel was dredged with the full knowledge and consent of the Corps of Engineers (444 U.S. at 167, 179-180).

There can be no comparable claim of a "distinct investment-backed expectation" in this case. Respondent apparently relies on the preliminary plat submitted by the original developer in 1973. But the very denomination of that filing as "preliminary" indicates that its approval by the Commission did not confer a vested right on the developer to subdivide and sell 736 lots. Indeed, under state law, a subdivision plat may be recorded only after it has received the *final* approval of the planning commission (Tenn. Code Ann. § 13-3-402 (1980)), and the Commission's regulations in this case explicitly provided that approval of the preliminary plat did not constitute acceptance of the final plat (C.A. App. 872). Moreover, the preliminary plat itself contained a notation that indicated that 267 lots were not to be developed until approved by the Commission. See page 4, *supra*.

Subsequent events further undermine the notion that respondent had a concrete expectation requiring the payment of compensation. Respondent voluntarily became the sole creditor of the developer of Temple Hills in 1977, at a time when progress was halted and the developer had failed to renew the preliminary plat in conformity with the Commission's regulations. See note 4, *supra*. And respondent purchased the remaining 258 acres at a foreclosure sale in November 1980, after the Commission had disapproved the developer's renewed preliminary plat under the 1980 regulations. See pages 5-6, *supra*. Respondent had ample notice of the relevant circumstances, and it therefore plainly had no constitutionally protected expectation that it would be entitled to develop the remainder of the Temple Hills tract in the manner depicted in the rejected preliminary plat or by application of the 1973 regulations. Compare *Ruckelshaus v. Monsanto Co.*, slip op. 17.¹⁷

¹⁷ The jury's verdict that the Commission was estopped under ordinary common law principles of course does not control the

C. THE AWARD OF DAMAGES FOR A "TEMPORARY TAKING" SHOULD BE REVERSED

For the reasons we have explained in Point B, respondent's argument that the Commission's rejection of the preliminary plat it filed in June 1981 amounted to a "taking" of its property within the meaning of the Fifth and Fourteenth Amendments would be wholly insubstantial even if the restrictions had been *permanently* applied to respondent's land. It follows *a fortiori* that there was no "taking" of respondent's property by virtue of the *temporary* application of those provisions for the limited period between October 1980, and the date of the jury's verdict in April 1982. The judgment of the court of appeals reinstating the jury's award of \$350,000 in damages for a taking of respondent's property during that period therefore should be reversed.

Accordingly, there once again¹⁸ is no occasion for the Court to consider whether compensation must be paid for the temporary application of a regulation that is subsequently held to constitute a taking. That question is not properly presented in this case in any event. The district court held on the basis of the jury's verdict that the Commission was prevented by state law from requiring respondent to comply with its current regulations rather than those in effect in 1973 (Pet. App. 27a-28a, 29a-30a; Tr. 2016-2108, 2027). The district court then concluded that "[a]ny damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law" (Pet. App. 26a). This Court repeatedly has made clear, however, that a claim for just compensation does not lie where the governmental action that is alleged to have

distinct question of whether the Commission was constitutionally barred from applying the amendments to the ordinance and regulations to respondent's land without paying just compensation. Cf. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, No. 83-245 (June 18, 1984).

¹⁸ See *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 623 (1981); *Agins v. City of Tiburon*, 447 U.S. at 263.

constituted a taking was not authorized. See, e.g., *Hooe v. United States*, 218 U.S. 322, 336 (1910); pages 16-17, *supra*. Respondent therefore has no claim to just compensation for the unauthorized actions by the Commission in 1980 and 1981, irrespective of whether those actions are regarded as having imposed permanent or temporary restrictions on respondent's use or development of its land. Respondent's claim for monetary relief in these circumstances instead is one sounding in tort, based on assertedly wrongful actions by agents of the State in their administration of a state statute. Governmental entities typically are immune from tort liability for such conduct. See *United States v. Varig Airlines*, slip op. 10-12; 28 U.S.C. 2680(a).

Thus, even if the Court were prepared to reach the question, this case would not be an appropriate vehicle by which to determine whether the Constitution requires that compensation be paid for the period between the date on which an authorized regulatory measure was adopted or finally applied to a particular parcel of land and the date on which a court strikes down the measure or its application on the ground that it would constitute a taking if the restrictions were given permanent effect.¹⁹ We argued in our amicus briefs in *Agins* and *San Diego* that the Constitution does not prohibit a state from determining that, as a general matter, only prospective relief is available in those circumstances. We continue to be concerned about the consequences of an inflexible constitutional rule that would require the payment of compensation in all such cases, particularly where, as here, the application of a zoning ordinance or other regulatory measure did not require the landowner to cease any existing use of the property or prohibit him from selling it, but, at most, simply had the effect of postponing the land-

¹⁹ The problem arises, of course, only where the governmental entity has chosen not to make compensation available and therefore not to accept and retain the property interest that the court has held would be taken.

owner's ability to devote the property to new uses.²⁰ Nonetheless, relief might be appropriate in particular cases involving such factors as unreasonable delay, bad faith, or interference with a distinct investment-backed expectation that development could proceed *immediately*. See, e.g., *Agins v. City of Tiburon*, 447 U.S. at 263 n.9; *Kirby Forest*, slip op. 11-14 & n.26.

We do not propose a definitive resolution of these questions here. Suffice it to say that the circumstances of this case do not suggest a compelling occasion for the announcement of a constitutional rule requiring the payment of compensation. In light of the established procedures for receipt and review of subdivision plats and the Commission's rejection of the developer's preliminary plat in October 1980, respondent could have no "distinct" or "reasonable investment-backed expectation" that it could proceed without delay during the 16-month period prior to the date on which it obtained a judicial determination that the permanent application of the regula-

²⁰ From the landowner's perspective, even if the permanent application of a regulatory measure would effectively destroy his interest in the property and thus constitute a taking, it would not necessarily follow that a temporary application of the measure has that effect; when the restriction is lifted, the property is restored to its market value. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 428, 435 n.12. By the same token, the development of land ordinarily is irreversible, and there accordingly is a strong countervailing public interest in maintaining the status quo pending the resolution of a legal dispute over whether the development may go forward. Temporary application of the regulatory measure therefore has essentially the same effect as a statutorily prescribed injunction pendente lite. The requirement that the landowner maintain the status quo for a reasonable period in this manner thus might be considered as "a burden borne to secure 'the advantage of living and doing business in a civilized community'" (*Andrus v. Allard*, 444 U.S. at 67, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting)) and one of the "incidents of ownership" in our increasingly urbanized and complex society—and therefore not be "considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939).

tory measures in effect in 1981 would constitute a taking. And yet respondent was awarded \$350,000 in damages for a temporary diminution in the value of the 258 acres, which even respondent's own expert testified ~~was~~ ^{were} worth only \$1,035,000 in 1982 (Tr. 679). An award of that magnitude is a windfall; it is not one of those "burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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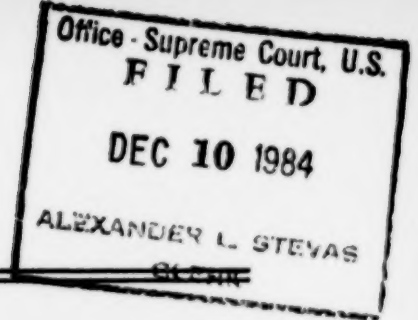
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NOVEMBER 1984

No. 84-4



In The
Supreme Court of the United States
October Term, 1984

— o —
WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al,

Petitioner,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

— o —
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

— o —
JOINT APPENDIX

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— o —
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PETITION FOR CERTIORARI FILED JULY 2, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

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RELEVANT DOCKET ENTRIES AT THE UNITED
STATES DISTRICT COURT FOR THE MIDDLE
DISTRICT OF TENNESSEE, NASHVILLE DIVISION

DATE NUMBER PROCEEDING

08/14/81	1	Complaint
09/18/81	13	Defendants' motion to dismiss for failure to state a claim upon which relief can be granted. C/S
10/05/81	18	Defendants' supplemental motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. C/S
12/14/81	33	Answer by Defendant to the Complaint. C/S
12/18/81	35	Order: Defendants' motion to dismiss came to be heard on 12/14/81 and was denied for reasons stated on the record. <i>Case Notice No. 5</i>
04/05/82	62	Jury Instructions.
04/19/82	75	Defendants' special request for interrogatories. C/S
04/19/82	76	Special verdict and interrogatories. C/S
04/20/82	77	Plaintiffs' request for jury instruction number 20.
04/23/82	88	Verdict form—damages: 1) The measure of damages for the temporary taking of Plaintiffs' property are found to be in the amount of \$348,945.50. 2) Nominal damages are found to be appropriate and are awarded in the amount of \$1,054.50.
04/26/82	89	Judgment on jury verdict: It is Ordered that upon the jury's verdict for Plaintiff on the issue of estoppel under Tennessee law, the Defendant Williamson County Regional Planning Commission is estopped from

DATE NUMBER PROCEEDING

requiring the Plaintiff to comply with the present regulations as opposed to the 1973 regulations; Upon the jury's verdict in favor of Plaintiff on the issue of a fifth amendment taking and the jury's determination of damages for the temporary taking of the Plaintiffs' \$1,054.50, Defendant Williamson County Regional Planning Commission will pay the said sum in damages to Plaintiff.

It is further Ordered that upon the jury's verdict, the individual Defendants are entitled to good faith immunity for any denial of procedural due process and the case against each individual Defendant is dismissed. It is further Ordered that upon the issues of denial of equal protection under the United States and Tennessee Constitutions, denial of substantive due process under the United States Constitution, violation of the Sunshine Law and violation of 42 USC Section 1985, the jury was directed to return a verdict in favor of Defendants and upon the issues of Eleventh Amendment immunity, absolute immunity and exhaustion of administrative remedy, the jury was directed to return a verdict against the Defendants.

It is further Ordered that upon the jury's verdict Plaintiff was not denied procedural due process by Defendants in the Commission's decision to apply the present regulations, nor did Defendants breach the terms of the completion bonds covering section IV and V of Temple Hills. *Case Notice No. 12*

05/03/82 90 Motion for Judgment Notwithstanding the Verdict and for a New Trial. C/S

DATE NUMBER PROCEEDING

05/04/82 91 Amended motion for Judgment Notwithstanding the Verdict and for a New Trial. C/S

05/06/82 95 Judgment of Permanent Injunction. *Case Notice No. 13*

05/13/82 99 Order of stay and of Injunctive Relief: Ordered that the enforcement of judgment of permanent injunction heretofore issued against the Williamson County Regional Planning Commission be and hereby is stayed, until the foregoing arguments can be held and a ruling issued thereon. It is further ordered that the Plaintiff, its agents, employees and counsel be enjoined from any further injunction heretofore issued against Williamson County Regional Planning Commission until the foregoing arguments can be held and a ruling issued thereon. *Case Notice No. 14*

05/20/82 100 Motion by Defendant for an order making more specific the permanent mandatory injunction heretofore issued in this cause or in the alternative, for this court to retain jurisdiction of the things and matters in this lawsuit to the extent of the court considering and approving or disapproving of all future preliminary and final plats submitted. C/S

06/03/82 110 Order: and judgment of permanent injunction. *Case Notice No. 15*

06/28/82 123 Notice of Appeal by Hamilton Bank. C/S

07/09/82 126 Notice of Appeal by Williamson County Regional Planning Commission.

RELEVANT DOCKET ENTRIES AT THE UNITED
STATES COURT OF APPEALS FOR THE SIXTH
CIRCUIT

DATE NUMBER PROCEEDING

06/30/82 1 Copy of notice of appeal filed; and cause docketed.

03/07/84 15 Judgment of the District Court reversed and case remanded for further proceedings. (Keith, Kennedy and Wellford, JJ) (Appellant to recover from Appellee).

03/21/84 17 Petition for Rehearing En Banc. (m-3/21).

04/20/84 20 Order denying petition for rehearing (Keith, Kennedy and Wellford, JJ).

07/19/84 23 Notice of filing of petition for writ of Certiorari (Sup. Ct. No. 84-4 7/2)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. _____

HAMILTON BANK OF JOHNSON CITY,

Plaintiff,

vs.

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, WILBURN H. KELLEY, JR., MITCHELL BEARD, ROBERT MEDAUGH, JACK MEAGHER, JOE BAUGH, CAROLYN WATERS, MORTON STEIN, KENNETH MCNEIL, CHARLES MOSLEY and THAYER MARTIN,

Defendants.

COMPLAINT

(Filed August 14, 1981)

1. Plaintiff, Hamilton Bank of Johnson City is a state banking institution organized and existing under Tennessee law, with its offices located in Johnson City, Tennessee.

2. The Williamson County Regional Planning Commission is a regional planning commission established pursuant to Tennessee Code Annotated § 13-3-101.

3. The individual Defendants are all members of the Williamson County Regional Planning Commission, with the exception of Defendants Morton Stein and Thayer Martin, who are on the staff of the Williamson County Regional Planning Commission in the capacity of County Planner and County Engineer, respectively.

4. The jurisdiction of this Court rests upon 28 U.S.C. § 1331(a), this being a civil action where the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and which arises under the Constitution and laws of the United States. Jurisdiction of this Court also rest upon 28 U.S.C. § 1343(1).

5. Plaintiff is the owner of approximately 258 acres located in the northern portion of Williamson County, Tennessee. From 1973 through the date of this Complaint, this property has been zoned "residential cluster" and is part of a subdivision known as Temple Hills Country Club Estates ("Temple Hills").

6. The initial sketch plan for Temple Hills was first approved by Defendant Planning Commission on February 1, 1973. The sketch plan was reapproved by Defendant Planning Commission, with modifications, on May 3, 1973. This action of Defendant Planning Commission allowed the developers and owners of Temple Hills to go forward with the development of the property. Since the initial approval of the sketch plan in 1973, Defendant Planning Commission has reapproved the initial sketch on June 6, 1974, June 19, 1975, April 20, 1978, April 19, 1979 and July 19, 1979. On each of these occasions, Defendant Planning Commission approved the initial sketch under 1973 zoning ordinances and subdivision regulations.

7. The purpose of the initial sketch plan is to provide a conceptual design within which future multi-stage development of the property must be accomplished. The initial sketch plan approved in 1973 met the existing subdivision regulations and zoning ordinances that were applicable to residential cluster developments at that time. In reliance

upon Defendant Planning Commission's approval, and in compliance with the applicable zoning ordinances and subdivision regulations, the owners and developers of Temple Hills purchased property, installed water and sewer lines, laid underground electrical wiring, gas and telephone lines, built roads, dedicated through an easement to the county a minimum of 245 acres as open space, built a 27 hole golf course, tennis courts, swimming pool, clubhouse and constructed approximately 150 individual residences. The Plaintiff alone, in reliance upon the action of the Defendant Planning Commission, has invested over \$2,000,000 in the development of Temple Hills, while other investors have invested another \$3,000,000.

8. In 1979, for the first time, the question arose as to whether the developer had the continuing right to develop Temple Hills under 1973 regulations and zoning ordinances. In the summer of 1979, Defendant Planning Commission attempted to change the rules of development in the middle of the game and retroactively applied new subdivision regulations and zoning ordinances to the Temple Hills development. The reason for this change in position by Defendant Planning Commission was that Defendant Kelley arbitrarily and illegally and in concert with some or all of the other Defendants decided to stop development in Williamson County, including much of the development that was already in progress. Defendant Kelley, an elected county official serving in the position of County Judge, has the power to nominate the other members of the Defendant Planning Commission. Prior to 1979, Defendant Kelley engaged in a systematic course of conduct designed to eliminate any members of the Defendant Planning Commission who opposed his no-growth philosophy and replace them with members of his own

"team". By the summer of 1979, he had made sufficient progress toward assembling his own team so that he was able to prevent the reapproval of the Temple Hills sketch plan under 1973 zoning ordinances and subdivision regulations. The Defendant Planning Commission, the individual Defendants, and in particular Defendant Kelley, have since engaged in a continuing effort and scheme to deprive the developers of Temple Hills of their right to continue and complete the development of the project under 1973 zoning ordinances and subdivision regulations. The Defendants have refused to reapprove the initial sketch plan under 1973 zoning ordinances and subdivision regulations and have instead insisted upon the application of newer, higher standards passed in 1979. These newer, higher standards would reduce the number of lots available for sale in the subdivision and would require a significantly greater amount of money to develop the property than would be required under 1973 standards. The Defendants have attempted to apply 1979 standards even though the following item appears in Paragraph 2.2 of the 1979 subdivision regulations:

"SAVINGS PROVISIONS"

These regulations shall not alter, modify, void, vacate or nullify any action now pending or any rights obtained by any person, firm, or corporation by a lawful action of the county prior to the adoption of these regulations."

Even under the new regulations as adopted by the Defendant Planning Commission, then, the approval granted to the developers of Temple Hills on at least eight occasions between 1973 and 1979 cannot be altered, modified, voided, vacated or nullified in any way whatsoever by application

of the new subdivision regulations. The Defendants, by ignoring this provision of their own regulations, have engaged in arbitrary, capricious, and unlawful action.

9. After receiving a series of extensions for the purpose of trying to satisfy the arbitrary demands of Defendant Planning Commission, the plan came up for renewal on October 2, 1980, at which time Defendant Planning Commission refused to reapprove the preliminary sketch of Temple Hills, thus preventing further development of the property. Temple Hills appealed this adverse decision to the appropriate authority, the Williamson County Board of Zoning Appeals, in November 1980. The Board of Zoning Appeals rejected the decision of Defendant Planning Commission and found that the developer of Temple Hills had the right to develop the property under 1973 standards. In so finding, the Board of Zoning Appeals rejected an argument by Defendant Stein and the county attorney that 1979 standards applied.

10. Following the decision by the Board of Zoning Appeals, the owners of Temple Hills returned to the Defendant Planning Commission seeking reapproval of the initial sketch so that development could proceed. In an effort to avoid litigation, the owners of Temple Hills have made a continuing effort to work with the Defendants by attempting to resolve any legitimate problems raised by the Defendants concerning further development. The Defendants have responded by engaging in a course of conduct calculated to frustrate, delay and prevent the completion of the project.

11. In an effort to satisfy the demands of the Defendants, two initial sketches of the Temple Hills development have been submitted for approval. One of the initial

sketches is the same plat that had been approved on numerous occasions in the past by Defendant Planning Commission. The second initial sketch was submitted, without waiving any rights to develop under 1973 standards, for the purpose of demonstrating Plaintiff's willingness to cooperate with the Defendant Planning Commission and its staff concerning several questions that they raised regarding the development. Despite compromise by Plaintiff on several of the questions, the Defendants continue to resist any further development by rejecting the conclusions of the Board of Zoning Appeals and by continually adding new requirements as preconditions of any approval by Defendant Planning Commission.

12. Defendants have insisted that the developer provide adequate fire protection in the form of a private contract with a recognized fire protection agency before any initial sketch would be renewed by Defendant Planning Commission. Plaintiff responded by obtaining such a proposed contract, only to find that the Defendants then insisted upon an additional requirement that the term of the contract be at least 20 years. The Defendants ignored the fact that the zoning ordinances and subdivision regulations do not make a fire protection contract a prerequisite for renewal, or even for initial approval. Moreover, volume 5 of the Comprehensive Plan, which serves as the underlying rationale for all zoning ordinances and subdivision regulations adopted in Williamson County, states in pertinent part as follows:

"Fire protection service should be available to all Williamson Countians. *The county* should negotiate with municipalities having fire departments and private fire departments for those departments to serve residents in outlying areas." (emphasis supplied)

Thus the county, and not the Plaintiff, should be responsible for providing fire protection. Nonetheless, the Defendants have advised the Plaintiff that Plaintiff's application for renewal of the initial sketch plan will not be approved until Plaintiff has secured fire protection. In negotiations between Plaintiff and representatives of Defendant Planning Commission, the representatives of Defendant Planning Commission could not identify one single instance where another developer was required to submit a contract with a fire department before obtaining initial sketch approval.

13. Defendants have denied approval on the alleged grounds that there are no recreational facilities and open space areas provided for children and residents in the areas of the sketch plan designated for multi-family housing. Once again, Defendants have deviated from their own standards in making this a precondition to approval. Although the zoning ordinances authorize cluster subdivisions and require such subdivisions to have a certain amount of open space, there is nothing in either the zoning regulations or the subdivision regulations that require open space to be allocated in any particular area, whether or not the area in question is one designated for multi-family housing. To the contrary, Defendant Planning Commission has adopted by unanimous vote the following policy:

"... it (is) the policy and the practice of the Commission with respect to cluster developments to require that the first section of each such cluster development complies fully with the regulations as to quantity of open space for that section, that any excess in quantity above the requirements might be credited to section 2 and the following sections and that this rule

be applied to all succeeding sections so that upon approval of any section the total quantity of open space in that section and all previously approved sections meets the requirements for the total quantity of open space area embraced in said section and all such previously approved sections and that the owner be required to convey to Williamson County, Tennessee, an open space easement as to said open space."

This policy was adopted by unanimous vote on December 11, 1974 by Defendant Planning Commission. Further, with respect to this specific development, the open space easement was submitted as part of the final plat Section I. This final plat, along with the open space easement, was approved by the Defendant Planning Commission on June 21, 1973. The minutes of this meeting stated that the open space easement was "prepared by the secretary of the Planning Commission conveying a permanent open space easement to Williamson County, Tennessee, which covered substantially all property in the subdivision except the lots which were to be sold to individuals". Both the open space easement itself and the minutes of the Defendant Planning Commission go on to state that "the easement could be modified, amended or abandoned or released only by resolution of the Quarterly County Court and with the consent and approval of the Planning Commission". The open space easement was then recorded in Deed Book 210, Page 57, Register's Office of Williamson County. The open space easement, having been prepared by the secretary of Defendant Planning Commission, approved by the full Defendant Planning Commission, and subject to modification only with approval of the Quarterly County Court, cannot be changed by the Defendants.

14. The Defendants have also indicated that Plaintiff, before obtaining initial sketch renewal, must complete

installation of underground electrical service in certain property located in Temple Hills but not owned by the Plaintiff. Plaintiff has advised Defendants that because it does not own the property, it has absolutely no right to enter upon the property and install underground electrical wiring. The Defendants, nevertheless, have insisted upon this as a precondition of renewal.

15. The Defendants have also insisted that Plaintiff rebuild a road in Temple Hills Subdivision that has already been dedicated to and accepted by the County. There is no basis for this requirement in any of the applicable zoning laws and ordinances. By insisting that Plaintiff rebuild the county road to subdivision standards, at a cost of several hundred thousand dollars, the Defendants are engaging in conduct that is tantamount to extortion.

16. The individual Defendants have engaged in the course of conduct described in this Complaint in derogation of the applicable subdivision regulations and zoning ordinances. The Defendants have specifically stated they will not follow the decisions of the Board of Zoning Appeals concerning Temple Hills. Plaintiff stands ready and willing to comply with any reasonable requirements under the zoning ordinances and subdivision regulations applicable in 1973 when Temple Hills was first approved. Defendants, however, are unwilling to allow development of Temple Hills to proceed under 1973 standards and in so doing have refused to recognize portions of their own standards, have selectively applied other portions of those standards to Temple Hills and have determined and conspired to stop the development of that project.

17. As further evidence of Defendants' selective application of its own standards, the Defendants have ignored the terms of certain completion bonds covering work to be done in Section IV and V of Temple Hills. The completion bonds in question previously were called by Defendant Planning Commission. The bonds were given by another developer in Temple Hills and were supported by irrevocable letters of credit issued by Plaintiff. The Defendants have taken the proceeds from these irrevocable letters of credit and have used the money to complete items not identified in the completion bonds. The Plaintiff has notified the attorney for Defendant Planning Commission of its objections to the use of the proceeds in violation of the terms of the completion bonds. Nevertheless, upon information and belief, Plaintiff alleges that bids have been let and money spent on work not covered by the completion bonds.

18. Individual members of the Defendant Planning Commission, and Defendant Kelley in particular, have subverted the interests of the citizens in Williamson County to their own personal interests and have acted arbitrarily, capriciously, maliciously and in bad faith in denying Plaintiff's application for renewal. As a result, the Plaintiff is entitled under common law to a mandatory injunction ordering the Defendants to approve the Plaintiff's application for renewal and to recover any damages suffered as a result of the unlawful denial of its application.

19. 42 U.S.C. § 1983 provides as follows:

"Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any cit-

izen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

By engaging in the course of conduct described in this Complaint, Defendants have conspired to deprive Plaintiff of the equal protection of local zoning laws and subdivision regulations. This course of conduct has been purposeful, knowing and reckless and is calculated to deprive the Plaintiffs of their ability to use, develop and sell Temple Hills. As a result, the Plaintiff is entitled to injunctive relief and the Defendants are liable for any damages to Plaintiff caused by such actions.

20. 42 U.S.C. § 1985 provides in pertinent part as follows:

"If two or more persons in any state or territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory of the equal protection of the laws . . . the parties so injured or deprived may have any action for the recovery of damages, occasion to buy such injury or deprivation, against any one or more of the conspirators."

By engaging in the course of conduct described in this Complaint, Defendants conspired to deprive Plaintiff of equal protection of the local zoning laws and subdivision regulations. The Defendants' conduct was purposeful,

knowing and wreckless and calculated to deprive the Plaintiff of its ability to use, develop and sell Temple Hills. Accordingly, the Plaintiff is entitled to injunctive relief and the Defendants are liable for any damages to Plaintiff caused by such actions.

21. The actions of the Defendants, as described in this Complaint, constitute an unlawful taking of property in violation of U.S. Constit. Amend. XIV. As a result, the Plaintiffs are entitled to injunctive relief in this cause.

22. The conduct engaged in by the Defendants and described in this Complaint constitutes a denial of equal protection as guaranteed by U.S. Constit. Amend. XIV. As a result, the Plaintiffs are entitled to injunctive relief.

23. The conduct of the Defendants, as described in this Complaint constitutes a violation of Tenn. Constit. Art. I § 8. As a result, the Plaintiff is entitled to injunctive relief in this cause.

24. The conduct of the Defendants, constitutes a denial of due process under U.S. Constit. Amend. XIV. As a result, Plaintiffs are entitled to injunctive relief in this cause.

25. The Plaintiff has acquired vested rights in the development by virtue of the prior approval of the Temple Hills plan by Defendant Planning Commission. As a result, Defendants should be enjoined from rejecting the Plaintiff's application for renewal of the initial sketch plan and should be ordered to approve Plaintiff's application under 1973 standards.

26. The Defendants are estopped under common law from rejecting Plaintiff's application for renewal of the

initial sketch plan. As a result, the Plaintiff is entitled to injunctive relief in this cause.

27. The Plaintiff is entitled to injunctive relief directing the Defendants to approve the Plaintiff's application for renewal of the Temple Hills plan under 1973 standards. Without approval of the project, development of the property is at a total standstill and the property is presently unmarketable. The Plaintiff has the right to the use and enjoyment of its property, including the right to develop the property, so long as it complies with the zoning laws and subdivision regulations applicable in 1973. As set forth in this Complaint, the Plaintiff's common law, statutory and Constitutional rights are all being violated by Defendants and, as a result, the Plaintiff has been and is suffering irreparable harm that will continue until the Defendants are enjoined from violating Plaintiff's rights and are ordered to renew the Temple Hills plan.

WHEREFORE, PLAINTIFF PRAYS FOR THE FOLLOWING RELIEF:

FIRST: A preliminary injunction enjoining the Defendants and their successors, and any and all person acting by or under their authority, from applying and enforcing any standards other than the 1973 zoning ordinance and subdivision regulations to any plan or plat submitted in connection with the Temple Hills Subdivision now or in the future.

SECOND: A preliminary injunction ordering and directing the Defendants to approve the Plaintiff's application for renewal of the Temple Hills plan and to allow the Plaintiff, or its successors in interest, to develop the Temple Hills property under the zoning ordinance and

subdivision regulations in effect when the Temple Hills plan was originally approved in 1973.

THIRD: A preliminary injunction ordering and directing the Defendants to recognize, adopt and apply the decision of the Williamson County Board of Zoning Appeals rendered with respect to Temple Hills on November 11, 1980.

FOURTH: That the trial of the action on the merits be advanced and consolidated with the hearing of the Plaintiff's application for the preliminary injunctions prayed for above pursuant to Rule 65, Fed. R. Civ. P. and that upon full hearing, the injunctive relief prayed for above be made permanent.

FIFTH: For compensatory damages in the amount of \$1,000,000.

SIXTH: For punitive damages in the amount of \$1,000,000.

SEVENTH: For attorney's fees.

EIGHTH: For the costs of this action.

NINTH: For such other, further and general relief to which the Plaintiff may be entitled.

/s/ G. T. Nebel

/s/ Frank C. Gorrell
Attorneys for Plaintiff

OF COUNSEL:

BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

This is the first application for extraordinary relief in this cause.

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

James Thomas Ragsdale, being first duly sworn, says that he is employed by the Plaintiff in the above entitled action; that he is authorized to make this verification on the Plaintiff's behalf; that he has read the foregoing Complaint and knows the contents thereof and that the same is true to his own knowledge.

/s/ James Thomas Ragsdale

Subscribed and sworn to before me this
14th day of August, 1981.

/s/ Virginia L. Lynch
Notary Public

My Commission Expires: 4/22/84

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 81-3567
JUDGE JOHN NIXON
JURY DEMAND

HAMILTON BANK OF JOHNSON CITY,
Plaintiff,

vs.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al,

Defendants.

ANSWER

(Filed Dec. 14, 1981)

Come now the Defendants, and for answer to the Complaint heretofore filed against them would state as follows:

1. That the Defendants are without knowledge, information or belief sufficient to either admit or deny the allegations contained in Paragraph 1 of the Complaint.

2. That it is admitted that the Williamson County Regional Planning Commission (hereinafter Regional Planning Commission) is a state agency established pursuant to Tennessee Code Annotated § 13-3-101, et. seq.

3. That it is admitted that the individual Defendants, with the exception of Morton Stein and Thayer Martin, are members of the Regional Planning Commission. It is further admitted that Morton Stein is the County Planner for Williamson County and that he is on a staff of the Regional Planning Commission. It is further admitted that Thayer Martin is the County Engineer for Williamson County, however, it is denied that he is "on the staff" of the Regional Planning Commission.

4. That it is denied that jurisdiction of the Court rests either upon 28 USC § 1333(a), or 28 USC § 1343(1).

5. That the Defendants believe that the plaintiff is the owner of some property in the northern portion of Williamson County, Tennessee; however, they are without knowledge, information or belief sufficient to know the exact acreage or exact location of said property within said County. It is further admitted that in 1973, Temple

Hills was approved as a "residential cluster" development and later as an "open space residential" development.

5.A. That the Defendants are without knowledge, information or belief sufficient to either admit or deny the allegations contained in Paragraph 5.A. of the Amended Complaint.

6. That it is admitted that a preliminary sketch plat for Temple Hills was approved by the Regional Planning Commission on February 1, 1973 and reapproved as modified on May 3, 1973. It is further admitted that the Regional Planning Commission approved a revised initial sketch plat for Temple Hills on June 6, 1974 and again on June 19, 1975. That the Defendants would show unto the Court that no other preliminary sketch plat or preliminary plats were submitted for approval until April 20, 1978 when a preliminary plat was approved by the Regional Planning Commission. Said date being after the adoption of the 1977 zoning ordinances. That the subdivision regulations then in effect, and to which the preliminary plat presented in 1975 were subject, provides that the "approval of the preliminary sketch plat shall lapse within one year from the date of such approval." (See subdivision regulations, Williamson County, Article II(b) (7)). It is further admitted that on April 19, 1979, the Regional Planning Commission granted a three month extension of approval, given to a preliminary plat in April, 1978, at the request of the then developer. That that preliminary plat was given an additional one month extension on July 19, 1979. That the defendants would further show unto the Court that on August 16, 1979 approval was given to a preliminary plat for Temple Hills subject to all the

then existing applicable zoning ordinances and subdivision regulations. That it is denied, that the preliminary sketch plats and preliminary plats, referred to in Paragraph 6 of the Complaint, were always approved under the zoning ordinances and subdivision regulations that were in effect in 1973, when the first preliminary sketch plat was submitted to the Regional Planning Commission. All other allegations that may be contained in Paragraph 6 of the Complaint which have not heretofore been specifically denied or admitted are now denied.

7. That it is denied that the preliminary sketch plat approved in 1973 was in compliance with the then existing subdivision regulations and zoning ordinances, for it would be impossible to determine from such preliminary sketch plat whether or not such plat met in totality the subdivision regulations and/or zoning ordinances. That the Defendants are without information, knowledge, or belief sufficient to either admit or deny that the plaintiff, or others, invested monies as alleged in the development at Temple Hills, but would demand strict proof thereof, if the same be relevant to this action.

8. That it is denied that any of the Defendants "attempted to change the rules of the development in the middle of the game" as is alleged in Paragraph 8 of the Complaint. Further, it is denied that any of the Defendants failed to apply the appropriate subdivision regulations and zoning ordinances as alleged in Paragraph 8 of the Complaint to any portion of the Temple Hills development which had received final approval. That the allegation, that the members of the Regional Planning Commission and the Defendant, Wilburn Kelley or other named Defendant, had made any attempts to stop Temple Hills

or any other development in Williamson County is denied. It is further denied that the savings provision alleged in Paragraph 8 of the Complaint contained in the 1979 subdivision regulations, Paragraph 2.2, applies to any portion of the property at Temple Hills which had not received final approval, and a final plat of which had not been property (sic) authenticated and recorded in the Register's Office of Williamson County, Tennessee. It is averred that all of the proposed development at Temple Hills, as well as all other developments in Williamson County, which had not received final approval and did not have final plats properly recorded, are subject to the existing regulations that are in effect at the time final approval is sought. All other allegations that may be contained in Paragraph 8 of the Complaint which may refer to the Regional Planning Commission and/or to any of the named individual Defendants which have not been heretofore admitted or denied are now specifically denied.

9. That it is denied that the plaintiff, or any of its predecessors, have ever tried to satisfy the requests of the Regional Planning Commission when the initial plat was considered for renewal on October, 1980. That it is specifically denied that any action of any of the Defendants named in this action have prevented further development of Temple Hills, but, rather the Defendants would aver that the actions of the plaintiff and its predecessors, in refusing to comply with appropriate zoning ordinances and subdivision regulations, are the causes for the prevention of the development of the property. It is denied that the Williamson County Board of Zoning Appeals has any authority to make the determination whether or not a developer of Temple Hills, or any other subdivision in

Williamson County, has the right to develop that property under any particular standards or regulations. Therefore, the actions alleged in Paragraph 9 of the Complaint which may have been taken by the Williamson County Board of Zoning Appeals are a nullity.

10. That it is admitted that the "owners" of Temple Hills did seek approval of the initial sketch plat by the Regional Planning Commission after they had appeared before the Williamson County Board of Zoning Appeals. It is denied that the "owners" of Temple Hills had ever made any effort to work with the Regional Planning Commission to resolve issues regarding the future development of Temple Hills. It is further denied that the Defendants, or any of them, have engaged in any course of conduct to "frustrate, delay or prevent completion of the project." That the Defendants would aver they have tried to assist the owners and developers of Temple Hills in obtaining approval of an initial plat so that the development of Temple Hills could go forward. That they have in good faith insisted that the owners and developers comply with all applicable zoning ordinances and subdivision regulations for the protection of the present and future residents of Temple Hills, which the owners and developers had consistently and continually refused to do.

11. That it is admitted that there were two initial sketches of Temple Hills submitted to the Regional Planning Commission in June, 1981. That it is denied that the plaintiff has ever demonstrated a willingness to cooperate with the Regional Planning Commission, the County Planner or the County Engineer in regard to completion of the project. It is denied that the Defendants, or any one of them, are resisting the further development of Temple

Hills. It is averred that if there have been "new requirements and pre-conditions" as alleged in Paragraph 11 of the Complaint, such requirements or pre-conditions are the result of the failure of the plaintiff and its predecessors to provide accurate and correct information to the Regional Planning Commission as is required by the appropriate zoning ordinances and subdivision regulations. All other allegations contained in Paragraph 11 of the Complaint are denied.

12. It is admitted that the Regional Planning Commission did request that the developers of Temple Hills provide adequate fire protection for the benefit of the present and future residents of the development. All other allegations contained in Paragraph 12 of the Complaint which may relate to any of the Defendants named herein which have not heretofore been denied are now specifically denied.

13. That it is denied that the Defendant, Regional Planning Commission, or any of the individual named Defendants, have denied approval of the plats submitted by the plaintiff solely for the reasons alleged in Paragraph 13 of the Complaint. That the "policy" set forth in Paragraph 13 of the Complaint was policy intended to require the requisite amount of open space be set aside for each section of a development, as it received final approval, to prevent a developer from relying on promises of future development to comply with open space requirements. That it is admitted that the plaintiff's predecessors in interest did grant, transfer and convey unto Williamson County, Tennessee, a perpetual easement upon certain land within the Temple Hills development. Further that

said easement in pertinent part contained the following language:

Said land shall not be used except for one or more of the following purposes;

(a) Recreational facilities, the primary purpose of which is to serve the residents of Temple Hills Country Club Estates;

That the plaintiff's predecessors, with the plaintiff's consent, have subjected the land, subject to said open space easement, to such restrictive covenants, and have conveyed interest in said land to others, so that the property is now no longer held for the purposes contemplated in said open space easement. That the land dedicated for use as open space in Temple Hills is in fact being held and used in a manner which is in direct conflict with the purposes set forth in the easement and in conflict with all applicable zoning ordinances. That it is denied that the Defendants have in any way attempted to change the open space easement as alleged in Paragraph 13 of the Complaint but it is averred that the plaintiff and its predecessors have taken actions to restrict the use of said open space in direct conflict with the said open space easement and appropriate zoning ordinances.

14. That it is denied that the allegations contained in Paragraph 14 of the Complaint constitute a "pre-condition of renewal" by the Regional Planning Commission. That since the date of filing of the Complaint, installation of the underground utility service, as raised in Paragraph 14 of the Complaint, has been completed by other parties at no cost to the plaintiff, and, therefore, should no longer be at issue.

15. That it is admitted that the Regional Planning Commission has requested the assistance of the plaintiff to rebuild a road in Temple Hills subdivision for the benefit of the present and future residents of that subdivision. It is denied that that particular portion of Temple Road, as it is now constructed, has been accepted by the County. It is denied that there is no basis for the requirement of upgrading roads by the Regional Planning Commission where a proposed development will increase traffic flow over such roads. It is specifically denied that any of the Defendants have engaged in any conduct that is "tantamount to extortion." The Defendants would aver, however, that all actions that have been taken were taken in good faith to protect the public interest by providing road service to the present and future residents of the Temple Hills development.

16. That it is denied that the Defendants or any of them, have engaged in a course of conduct which would be in derogation of applicable subdivision regulations and zoning ordinances. That it is admitted that the Regional Planning Commission did not follow the decision of the Zoning Board of Appeals as alleged in Paragraph 16 of the Complaint. It is further averred that the Regional Planning Commission and the individual members thereof would violate their duties and responsibilities to the offices they hold to follow an erroneous decision such as that issued by the Board of Zoning Appeals. It is further denied that the plaintiff is ready and willing to comply with the reasonable requirements set forth by the Regional Planning Commission, because it has in the past consistently failed and refused to do so. It is admitted that the Regional Planning Commission is unwilling to allow the

development of Temple Hills to proceed under 1973 standards, because such portions of the development which have not received final approval, is currently subject to later standards and regulations all in accordance with law. It is denied that any of the defendants have selectively applied the standards applicable to all development in Williamson County, Tennessee, or that they have conspired to stop the development of the Temple Hills project. The Defendants and each of them, would state however, that if the owners and developers of Temple Hills would substantially comply with the applicable regulations, standards and ordinances that they would be willing to support the continuation of development of Temple Hills, for it is the belief of the individual Defendants that the completion of the development under applicable regulations, standards and ordinances is in the best interest of the residents of Temple Hills, as well as all residents of Williamson County, Tennessee.

17. That Paragraph 17 of the Complaint is denied.
18. That Paragraph 18 of the Complaint is denied.
19. That Paragraph 19 of the Complaint is denied.
20. That Paragraph 20 of the Complaint is denied.
21. That Paragraph 21 of the Complaint is denied.
22. That Paragraph 22 of the Complaint is denied.
23. That Paragraph 23 of the Complaint is denied.
24. That Paragraph 24 of the Complaint is denied.
25. That Paragraph 25 of the Complaint is denied.
26. That Paragraph 26 of the Complaint is denied.

26.A. That Paragraph 26.A. of the Amended Complaint is denied.

27. That Paragraph 27 of the Complaint is denied.

28. That all other allegations that may be contained in the Complaint against any of the named Defendants which have not heretofore been admitted or denied are now specifically denied.

29. That in addition to the defenses raised above to the action filed against them, the Defendants and each of them would show unto the Court the following affirmative defenses:

(a) That the Complaint fails to state a claim upon which relief can be granted against the Regional Planning Commission, or any of the individually named Defendants.

(b) That the Court lacks subject matter jurisdiction to grant the relief sought by the plaintiffs against the Regional Planning Commission or any of the individually named Defendants.

(c) That the plaintiff has failed to exhaust its administrative remedies available to it prior to bringing this action.

(d) That the relief sought by the plaintiffs for the allegations contained in Paragraph 17 of the Complaint is premature in that the work that is complained of, is continuing and it is impossible at this time to determine the actual amount of expenditures.

(e) That all the actions taken by all the named individual members of the Regional Planning Com-

mission and the other named individual Defendants were taken in their official capacities in good faith and with the reasonable belief that such action did not violate the constitutional rights of the plaintiff or any other persons.

(f) That the statute of limitations is applicable to the claims made by the plaintiff.

(g) That the actions of the individual named Defendants, who are members of the Regional Planning Commission, complained of by the plaintiff were taken in their official capacity as members of the Regional Planning Commission in either a quasi legislative or quasi judicial capacity, and therefore, they are immune from the damages sought by the plaintiff, as all such actions are within the discretion and authority of the individual members of the Regional Planning Commission.

(h) That the Regional Planning Commission is a state agency and thus has sovereign immunity under the Eleventh Amendment of the United States Constitution against the plaintiff's claim for monetary damages and injunctive relief.

(i) That the individual named Defendants are members or employees of the Regional Planning Commission and thus have sovereign immunity under the Eleventh Amendment of the United States Constitution against plaintiff's claim for monetary damages.

(j) That the Regional Planning Commission and individual named Defendants are not "persons" within the meaning of the Civil Rights Act, 42 USC §§1983,

1985 and thus not amenable to suit by the plaintiff thereunder.

WHEREFORE the Defendants and each of them pray that this action be dismissed, that they have their costs in this cause and demand a jury to try this action.

Respectfully submitted,
STEWART, ESTES & DONNELL

By: /s/ Thomas M. Donnell, Jr.
Robert L. Estes
Thomas M. Donnell, Jr.
M. Milton Sweeney
Attorneys for Defendants
14th Fl, Third Nat'l Bank Bldg.
Nashville, TN 37219
615/244-6538

CERTIFICATE

I, hereby certify that a true and exact copy of the foregoing Answer has been hand delivered to G.T. Nebel and Frank Gorell, Attorneys for Plaintiff, BASS, BERRY & SIMS, 2700 First American Center, Nashville, Tennessee 37238 on this the 14th day of December, 1981.

/s/ Thomas M. Donnell, Jr.

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY

VS.

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, ET AL

VERDICT FORM

(Filed April 21, 1982)

We, the Jury in the above-entitled action find as follows:

1. Has plaintiff been denied procedural due process of law, i.e., a fair and impartial hearing, by the defendants in the Commission's decision to apply the present regulations?

Yes. — No. ✓

2. Are the defendants, or any one of them, entitled to good faith immunity, as explained to you in these instructions for any denial of procedural due process? If so, indicate which defendants are entitled to good faith immunity by placing a check mark by his or her name.

- ✓ Wilburn H. Kelley, Jr.
- ✓ Mitchell Beard
- ✓ Robert Medaugh
- ✓ Jack Meagher
- ✓ Carolyn Waters
- ✓ Morton Stein
- ✓ Kenneth McNeil
- ✓ Charles Mosley
- ✓ Thayer Martin

3. Has plaintiff been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment?

Yes. ✓ No. —

4. Are the defendants estopped from requiring the plaintiff to comply with the present zoning regulations as opposed to the 1973 regulations?

Yes. ✓ No. —

5. Have the defendants breached the terms of the completion bonds covering Section IV and V of Temple Hills?

Yes. — No. ✓

/s/ MICHAEL ANGLIN 4-21-82
Foreman/Forewoman

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE,
NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY
VS.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL

VERDICT FORM — DAMAGES

(Filed April 23, 1982)

We, the jury in the above-entitled action assess damages, if any, for the plaintiff and against the defendant as follows:

1. The measure of damages for the "temporary taking" of plaintiff's property are found to be in the amount of \$348,945.50.

2. Nominal damages are found to be appropriate and are awarded in the amount of \$1054.50.

/s/ MICHAEL ANGLIN 4-23-82
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY,

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL

JUDGMENT OF PERMANENT INJUNCTION

Defendants' motion for judgment notwithstanding the verdict pursuant to FED.R.CIV.P.50(b) is granted and judgment is hereby entered on behalf of defendants on the issue of whether plaintiff has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment. Judgment notwithstanding the verdict will be denied as to the verdict that defendants are estopped under state law from applying the present regulations rather than those applicable in 1973. In accordance with FED.R.C.P.50(c)(1) the Court conditionally denies defendants' motion for a new trial on all issues should the judgment herein be vacated or reversed on appeal.

Upon reconsideration and further argument of the parties, the judgment of permanent injunction entered by

the Court on May 6, 1982, is hereby ORDERED withdrawn and the following judgment of permanent injunction shall issue:

This cause came on to be heard on the 20th day of April, 1982, and on previous days before the Honorable John T. Nixon and a jury of lawful men and women who were sworn to try the issues joined and who were respited from day to day, and after the conclusion of all the proof, the argument of counsel, and the charge of the Court, the jury did retire to consider their verdict. After due deliberation, the jury returned to open Court and announced that they had found that the plaintiff, Hamilton Bank of Johnson City, has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment and that the defendants should be estopped from requiring the plaintiff to comply with the present regulations as opposed to the 1973 regulations. The Court subsequently granted defendants' motion notwithstanding the verdict and entered judgment on their behalf on the issue of violation of the Just Compensation Clause of the Fifth Amendment.

IT IS THEREFORE, ORDERED that defendants, their officers, agents, representatives, employees, successors, and all persons acting on their behalf, be, and they are, hereby permanently enjoined and restrained from requiring plaintiff, its successors and assigns, to comply with any zoning ordinances, subdivision regulations, or other laws or regulations that may be applicable other than the zoning ordinances, subdivision regulations or other laws that may be applicable that were in force in Williamson County, Tennessee and applicable to Temple Hills Country Club Estates development in May 1973. A

memorandum opinion will be issued subsequent to the entry of this ORDER.

Entered this 2nd day of June, 1982.

JOHN T. NIXON

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY,

vs.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al,

MEMORANDUM

Presently pending before the Court are defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Also pending is defendants' motion to reconsider or amend the Judgment of Permanent Injunction. For the reasons discussed below the defendants' motion for judgment notwithstanding the verdict will be granted on the issue of whether plaintiff has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment. Pursuant to the reasoning discussed below, the motion will be denied as to the verdict that defendants are estopped under state law from applying the

present regulations rather than those applicable in 1973.¹ Upon reconsideration, the Judgment of Permanent Injunction entered May 6, 1982, will be ORDERED withdrawn and the Judgment of Permanent Injunction issued in an accompanying order.

This matter came for hearing on April 5, 1982, and continued until April 21, 1982. At the close of plaintiff's evidence, defendants moved for a directed verdict on all issues. The motion was taken under advisement and judgment reserved by the Court until the close of all the evidence. At the close of all the evidence, defendants renewed their motion. The Court held that defendants had rationally applied applicable ordinances and regulations in this matter. The Court further found that the plaintiff had not been denied substantive due process nor had the plaintiff been denied equal protection and directed the verdict for defendants on these issues. The Court instructed the jury and provided a special verdict form requiring them to answer five questions. As a result of the jury's deliberation, the jury found that the plaintiff had not been denied procedural due process and had been given a fair hearing before the Williamson County Regional Planning Commission. The jury further found that the members of the Planning Commission and other named defendants had acted reasonably and in good faith.

The jury returned a verdict that the plaintiff had been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment.

¹Formal findings of fact and conclusions of law are not required in decisions on motions under FED. R. CIV. P. 50(b), however, the District Court should render an opinion justifying its actions. *Garrison v. Jervis B. Webb Co.*, 583 F.2d 258, 261 n.3 (6th Cir. 1978). The grounds for denial of a new trial motion under Rule 50(c) (1) must be specified.

The jury also found that the Williamson County Regional Planning Commission should be estopped under state law from requiring plaintiff to comply with present zoning regulations as opposed to the regulations in effect in 1973.

Upon receipt of the verdict the Court was concerned with potential inconsistency between the jury's verdicts finding a Fifth Amendment taking and, at the same time, finding that the defendants were estopped from requiring compliance with the present as opposed to the 1973 regulations. Reflecting the Court's concern with this possible inconsistency in instructing the jury as to damages, the Court instructed the jury to award damages only for a "temporary taking" and nominal damages. The jury returned a verdict of damages in the amount of \$348,945.50 for the "temporary taking" and nominal damages in the amount of \$1,054.50.

The Court in considering defendants' present judgment notwithstanding the verdict motion must consider all of the evidence in the light most favorable to the plaintiff and refrain from weighing conflicting testimony. *Price v. Firestone Tire and Rubber Company*, 321 F.2d 725 (6th Cir. 1963); see, *Cecil Corley Motors Co. v. General Motors Corp.*, 380 F.Supp. 819 (M.D. Tenn. 1974). However, such a motion raises a question of law which must be dealt with by the Court. Viewing the evidence under the applicable standard, the Court concludes that, as a matter of law, there was insufficient evidence upon which the jury could conclude that defendants violated the Just Compensation Clause of the Fifth Amendment, in light of the verdict that, under state law, defendants are estopped from requiring plaintiff to comply with the present rather than the 1973 regulations.

Under the jury's verdict the applicable state law on estoppel prevents defendants from requiring plaintiff's compliance with the present regulations. Thus, the result of defendants' attempts to enforce the present as opposed to the 1973 regulations amounted to a temporary deprivation of the use of the property anticipated under the 1973 regulations.

The question of what constitutes a taking for Fifth Amendment purposes has never been answered explicitly by the United States Supreme Court but rather has been left to be determined through essentially ad hoc factual inquiries. *Penn Central Transportation Company, et al v. City of New York*, 438 U.S. 104, 123-124 (1978). In addition to the character of the governmental action, relevant factors to be considered include the economic impact of the regulation on the claimant and the extent of the resulting in interference with investment backed expectations. The dissent in the *Penn Central* case points out that the standards by which to weigh these factors are not absolutely clear. *Id.* at 149 n. 13 (Rehnquist, J., dissenting). However, the Supreme Court does make it clear in *Penn Central* that its decisions sustaining land-use regulations which are reasonably related to promoting the general welfare "uniformly reject the proposition that diminution in property value, standing alone, can constitute a 'taking'." *Id.* at 131. More recently, in *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 2141 (1980), the Court stated that the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. In the present case, this Court determined at the

close of the proof that the regulations in question advance legitimate state interests and directed the verdict for defendants on the issues of substantive due process and equal protection. That left for the jury, under the taking analysis of *Agins*, only the question of denial of economically viable use in violation of the Fifth Amendment.

Viewing the evidence in the light most favorable to plaintiff, there was a showing of a significant interference with investment-backed expectations under the present regulations as opposed to the 1973 regulations. Under the reasoning of *Penn Central*, the Court would have difficulty determining that such interference and resulting diminution in property value amounts to a taking. However, given the verdict on the estoppel issue, the Court has no difficulty determining that such temporary interference with investment-backed expectations and temporary diminution in value does not constitute a taking for which compensation is required under the Fifth Amendment. Any damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law. Because the state law itself prevents continued application of those regulations, there can be no taking of property prohibited by the Just Compensation Clause of the Fifth Amendment. As part of this analysis, of course, the Court has concluded that, under the proper standard of review of evidence, the jury's verdict on the estoppel issue under state law should not be disturbed.

Obviously, the Court will grant a motion for judgment notwithstanding the verdict only after the most careful consideration. The Court observes that the case was well tried by able attorneys before a conscientious jury. How-

ever, the jury's finding that plaintiff was denied economically viable use of its property in violation of the Just Compensation Clause of the Constitution is not supported by the evidence under the applicable standard of review. The jury was entitled to conclude under the evidence that there was a temporary diminution in value of the property and damages associated, among other things, with the delay of plaintiff's project. To reiterate, however, such evidence supports only the conclusion that the denial of economically viable use was temporary until such a time as defendants were estopped from requiring compliance with the present regulations. Such a temporary denial, even when associated with substantial costs to plaintiff in the amount allowed by the jury as compensation for the "temporary taking," does not, as a matter of law, constitute a taking under the Fifth Amendment.

Pursuant to FED. R. CIV. P. 50(c)(1), the Court will conditionally deny defendants' motion for a new trial. The Court has found no errors at trial which could be remedied upon retrial nor other available evidence which, in fairness, should be presented to a new jury. All factual issues were fully and properly tried. The question of whether the temporary interference with the plaintiff's development backed expectations and any temporary diminution in value of the property, whether styled as a "temporary taking" or otherwise, amounts to a taking in violation of the Fifth Amendment is essentially a question of law. The relevant facts to which this question of law must be applied could not be further or more fairly developed upon re-trial.

The Court has carefully considered the arguments of the parties pertaining to difficulties in complying with

the Judgment of Permanent Injunction entered May 6, 1982. The purpose of such equitable relief is to enforce the jury's verdict which estopped defendants from requiring plaintiff to comply with the present regulations rather than the 1973 regulations. Therefore, the Court will withdraw the previous injunction and issue an injunction which simply requires the defendants to apply the 1973 regulations to the Temple Hills development. Any application by defendants of regulations other than the 1973 regulations would be violative of this injunction. The Court will not countenance attempts to impose regulations which the jury has determined may not be imposed under state law. However, legitimate technical questions of whether plaintiff meets the requirements of the 1973 regulations are capable of resolution through the applicable state and local procedures of appeal. *See e.g. TENN. CODE ANN. § 13-7-08.* This Court should not attempt to assume the functions of a "court of zoning appeals" to review every question of the technical application of the 1973 regulations. *See, Kent Island Joint Venture v. Smith*, 452 F.Supp. 455, 464 (D.Md. 1978).

The ORDER entered by this Court on June 3, 1982 at 2:30 p.m. is in accordance with the reasoning of this memorandum.

This the 4th day of June, 1982.

John T. Nixon

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE

NO. 81-3567-N
JUDGE JOHN NIXON

HAMILTON BANK OF JOHNSON CITY,
Plaintiff

v.

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, et al.,
Defendants

NOTICE OF APPEAL

(Filed June 28, 1982)

Notice is hereby given that Hamilton Bank of Johnson City, plaintiff, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment and orders entered June 3, 1982 and June 17, 1982, in which the defendants' motion for judgment notwithstanding the verdict was granted and this Court's earlier judgment of permanent injunction was modified.

Respectfully submitted,

/s/ G. T. Nebel
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
615/244-5370
Attorney for Plaintiff

Certificate of Service

I hereby certify that a true copy of the foregoing Motion has been served upon counsel of record for the defendants by depositing a copy of the same in the United States mail this 25th day of June, 1982.

/s/ G. T. Nebel

No. 82-5388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAMILTON BANK OF JOHNSON CITY,

Plaintiff-Appellant,

v.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee, Nashville Division.

Decided and filed March 7, 1984

Before: KEITH, KENNEDY, and WELLFORD,
Circuit Judges.

KENNEDY, Circuit Judge, delivered the opinion of
the Court, in which KEITH, Circuit Judge, joined. WELL-
FORD, Circuit Judge, (pp. 15-21) filed a separate dis-
senting opinion.

KENNEDY, Circuit Judge. Hamilton Bank of John-
son City appeals from a judgment that as a matter of law
it is not entitled to damages for a temporary taking of its
property under the fifth and fourteenth amendments.
Hamilton's claims arise from appellee Williamson Coun-
ty Regional Planning Commission's refusal to allow Ham-
ilton to complete construction of a residential subdivision.

I

Hamilton is the successor in interest of the develop-
ers of a tract of land in Williamson County, Tennessee.
In 1973, Williamson County changed its zoning ordinances
to permit cluster residential developments. Under cluster
development houses may be built on smaller lots than
would otherwise be allowed, upon the condition that suf-
ficient land within the development be left as "open space."
In 1973 the planning commission approved a preliminary
plat for a proposed cluster development covering 676
acres, to be known as Temple Hills County Club Estates.
A notation on the approved plat indicated that the total
number of allowable dwelling units on the tract was 736.
However, lot lines were only drawn in for 469 units; the
areas in which the remaining 267 units were to be placed
were left blank and bore the notation "this parcel not to
be developed until approved by the planning commission."
The planning commission minutes reflect that the plat
was approved after considerable discussion of whether the
plat complied with density requirements. The plat was
apparently in compliance under one interpretation of the
zoning regulations, but not under an alternate interpreta-
tion. There was also some disagreement over the method
to be used in calculating slopes in order to determine
whether the development would violate the requirement
that lots not be placed on slopes greater than 25%. The
total number of units approved by the planning commis-
sion is in dispute. Hamilton introduced at trial a letter
signed by six members (a majority) of the 1973 planning
commission stating that 736 units had been approved.

Development of the project began. The developers
dedicated an easement of open space to the county cover-

ing about 245 acres, most of which was to be used as a golf course, they built roads, and they installed sufficient utility lines to accommodate the entire development. Before construction was actually commenced on any particular section, a final plat for that section was submitted for approval by the planning commission. Between 1973 and 1979, the commission approved final plats for several sections. The preliminary plat was also reapproved several times between 1973 and 1979. A witness for Hamilton testified that the developers spent three to five million dollars for improvements to the property during this time.

In 1977, the zoning regulations were changed. The planning commission continued to apply the 1973 regulations to Temple Hills, however, since the project had originally been approved under those standards. This policy changed in 1979, when the planning commission decided to consider plats submitted for renewal under the regulations then in effect rather than those in effect when initial approval had been given. On August 16, 1979, the plat was renewed under the 1979 regulations.

In October 1980, the plat was again submitted to the planning commission for approval. This time the plat was disapproved, for two reasons: non-compliance with density requirements, and lots placed on slopes greater than 25%. In November 1980, Hamilton through foreclosure acquired the property that had not yet been developed and sold. Hamilton submitted a preliminary plat, which apparently included plans for development of the 258 remaining undeveloped acres by building 476 dwelling units to bring the development's total to 688. The planning commission disapproved this plat on June 18, 1981, listing eight objections.

Hamilton then brought this action against the planning commission under five theories: (1) taking without just compensation; (2) violation of procedural due process; (3) violation of substantive due process; (4) denial of equal protection; and (5) estoppel under state law from not allowing the project to proceed.

After a trial, the District Court granted the planning commission's motion for a directed verdict on the substantive due process and equal protection claims. The case was submitted to the jury on the remaining theories. The jury returned a verdict with answers to special interrogatories to the effect that Hamilton had not been denied procedural due process, but had been denied economically viable use of its property in violation of the just compensation clause of the fifth amendment, and that the planning commission was estopped under state law from requiring Hamilton to comply with the present zoning regulations as opposed to the 1973 regulations. The jury assessed damages against the planning commission in the amount of \$350,000 for the temporary taking of Hamilton's property for the period from the disapproval of the plat to the time of trial.

The District Court issued a permanent injunction which required the planning commission to apply the 1973 regulations to Temple Hills consistently with its prior decisions, to approve the plat submitted in 1981, and to comply with ten specific requirements governing its future actions toward Temple Hills.

The District Court then granted judgment notwithstanding the verdict in favor of the planning commission on the taking issue. The court found the evidence sufficient to support the verdict that there had been a taking,

but held that judgment on the taking issue would be inconsistent with the jury's finding that the planning commission was estopped from applying current regulations. The court reasoned that:

Any damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law. Because the state law itself prevents continued application of those regulations, there can be no taking of property prohibited by the Just Compensation Clause of the Fifth Amendment.

The District Court also modified its permanent injunction to merely enjoin the planning commission from applying post-1973 regulation to Temple Hills, and denied Hamilton's motion for attorney fees.

Hamilton appeals from the judgment notwithstanding the verdict and asks this Court to order judgment based on the jury's damage award. Alternatively, Hamilton argues that the directed verdict on the substantive due process and equal protection claims was in error and requests a remand for trial on those issues. Hamilton also argues that it is entitled to its attorney fees.

II

This Court has held that:

On a motion for judgment n.o.v. as on a motion for a directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. . . . Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal.

O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975). We must view the evidence in the light most favorable to

Hamilton, drawing from that evidence all reasonable inferences in Hamilton's favor. *Pike v. Benchmark Mfg. Co.*, 696 F.2d 38, 40 (6th Cir. 1982); *National Polymer Prods. v. Borg-Warner Corp.*, 660 F.2d 171, 178 (6th Cir. 1981). The District Court's judgment on the taking issue must, therefore, be reversed if the evidence supports an award for a taking of Hamilton's property without just compensation within the meaning of the fifth amendment. We thus turn to that question.

The Supreme Court has not set forth a clear standard by which to determine whether particular conduct amounts to a "taking" under the fifth amendment.¹ Resolving this question generally requires an ad hoc, factual inquiry. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

A taking does not require an actual physical occupation of the property or formal condemnation proceedings. *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983). The Supreme Court established in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that governmental regulation affecting an owner's use of his property may constitute a taking.² In *Pennsylvania Coal*, a statute pro-

¹The taking clause of the fifth amendment applies to the states through the fourteenth amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

²The Supreme Court has consistently recognized, at least implicitly, that governmental regulation without physical occupation may effect a taking. See *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

hibited mining coal in such a way as to cause a residence to subside, where the owner of the underground mining rights was not the owner of the surface habitation rights. The Court employed a practical economic analysis to determine that application of the statute effected a taking, saying: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it" 260 U.S. at 414.

The taking clause was more explicitly held applicable to zoning regulation in *Agins v. City of Tiburon*, 447 U.S. 255 (1980). The Court there held that:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 227 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 36 (1978).

447 U.S. at 260. The Court in *Agins* also held that restricting the spread of urbanization was a legitimate governmental purpose. Since this purpose was served by the planning commission's actions now in dispute,³ our inquiry must focus upon whether Hamilton has been denied economically viable use of its land.

It is well established that there is no taking merely because the owner's best or most profitable use of the

³The planning commission does not claim that its actions were necessary to prevent an immediate serious hazard to the safety or property of the community. The state may require destruction of property that poses such a hazard without paying compensation. *Miller v. Schoene*, 276 U.S. 272 (1928).

property has been denied. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). It is similarly true that diminution in property value alone does not constitute a taking. *Penn Central*, *supra*; *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The District Court instructed the jury concerning these points, and also told the jury that "there can be no impermissible taking within the meaning of the Fifth Amendment if the regulations as applied permit economically viable use of the property." Tr. at 2015. See *Penn Central*, *supra*.

The property in question in this case is the as yet undeveloped portion of a residential subdivision. The subdivision as a whole was originally a farm, but the land is generally very hilly and rocky except for the land presently being used for the golf course. An appraiser testified at trial that the land is not suitable for farming or any use other than subdivision development, and that applicable zoning laws would in any event not permit any other use. Indeed, there is no suggestion in the record or from the parties of any alternative, economically viable use for Hamilton's property other than residential. The same appraiser also testified that, if the property were to be developed in accordance with the eight objections listed by the planning commission when it denied approval of Hamilton's development plan, only 67 sites could be used for residences, thus forcing Hamilton to eliminate 409 potential building sites from its proposal to develop 476 additional units. Were Hamilton to complete the development and be able to sell only 67 sites, it would sustain net losses of over one million dollars because of the cost of satisfying the planning commission's

eight objections. The appraiser's conclusion, therefore, was that the land had no remaining significant value.⁴ As there was no convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use.⁵

⁴Since the evidence is that the land owned by Hamilton was left with *no* remaining significant value, this case is distinguishable from those cases in which mere diminutions in value have been held not to constitute takings because economically viable uses remained.

⁵The dissent in its second paragraph seems to imply that the testimony that the planning commission's objections would only allow Hamilton to construct 67 additional units is incredible: "[I]t was virtually conceded that even applying 1979 standards a total 548 units would be approved on the property. Thus elimination of even 409 potential units would leave a substantial number yet to be developed." We have difficulty understanding the dissent's use of these numbers. The 1979 density requirements which would permit at most 548 units on the entire development (of which a part (212 units) is already developed and not owned by Hamilton) were only one of the planning commission's eight objections. Had this been the planning commission's only restriction on development, Hamilton would apparently have been free to build 336 units in addition to the 212 extant to bring the development's total to 548. (The dissent incorrectly juxtaposes a number referring to the total number of units in the entire development (548) with the number of units (409) that the planning commission's restrictions eliminated from Hamilton's plans to develop 476 units on the undeveloped portion now owned by Hamilton.) If 336 additional units had been permitted, the land may very well have retained an economically viable use. However, the planning commission also listed seven other objections to Hamilton's proposal. The appraiser considered all eight restrictions and concluded that they allowed at most 67 units on Hamilton's property. There is no evidence inconsistent with the appraiser's reasoning or conclusion, and his testimony was sufficient to allow the jury to find that with the eight restrictions Hamilton's property had no remaining economically viable use.

The planning commission's primary contention on appeal, however, is not that the property retains an economically viable use but rather that Hamilton has never submitted a plat that complies with either the 1973 or the 1977 regulations, and thus never acquired rights in developing the property that could have been taken away by the commission.

The planning commission's argument fails. It is based on factual premises that are inconsistent with the jury's findings regarding the state law estoppel claim. The District Court instructed the jury on the estoppel issue as follows:

[I]f you find that [Hamilton] in good faith made a substantial change in position or incurred extensive obligations and expenses in reliance upon the previous approval of the Temple Hills project by the [planning commission] so that it would be inequitable and unjust to destroy the right to develop Temple Hills which [Hamilton] had acquired, then you should . . . find that the [planning commission] was estopped or prevented from exercising [its] regulatory powers in such a way as to deprive [Hamilton] the right to develop the Temple Hills project.

The jury returned a verdict in favor of Hamilton on the estoppel issue. It must, therefore, have found that Hamilton had acquired a right to develop Temple Hills according to the plats that had been submitted. There is sufficient evidence in the record to support such a finding. The planning commission approved plans for the development on numerous occasions, and there is considerable evidence that the planning commission intended to and did approve a maximum of 736 units.

Even if Hamilton had not had a vested right under state law to finish the development, its claim that a taking occurred would not necessarily be foreclosed. Instead of looking to see whether "rights" have been destroyed, the Supreme Court in zoning cases has engaged in an economic analysis of the degree of interference with "investment-backed expectations." "The economic impact of the regulation, especially to the degree of interference with investment-backed expectations, is of particular significance." *Loretta v. Teleprompter Manhattan CATV Corp.* 102 S. Ct. 3164, 3171 (1982). See also *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 & n.27 (1978). The jury was entitled to find that Hamilton and its predecessor in interest had a reasonable expectation that the development could be completed, in light of the evidence that the commission approved the preliminary plats on numerous occasions with the knowledge that a total of 736 units were intended. This was the developers' "primary expectation concerning the use of the parcel," *Penn Central*, 438 U.S. at 130, and was backed by considerable investment in land and improvements.

The District Court found that there had been a "significant" interference with investment-backed expectations, but nevertheless held that the evidence did not support a taking because it considered the taking verdict inconsistent with the estoppel verdict. In its memorandum opinion the court discussed two reasons for finding the jury's taking verdict unsupported. First, the court reasoned that the estoppel verdict made the denial of property only a temporary one, which could not constitute a fifth amendment taking. A temporary deprivation of property, however, can be a taking and "should be ana-

lyzed according to the same framework applied to permanent irreversible 'takings.'" *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan J., dissenting). See also *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Second, the District Court apparently concluded as a matter of law that the application of zoning regulations in a manner impermissible under state law, as established by the estoppel verdict, could not be a taking.⁶ This argument is belied by the cases which consistently indicate that the application of the zoning laws, rather than the mere existence of a valid zoning ordinance, may effect a taking. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property" may effect a taking (emphasis added).);⁷ *Hernan-*

⁶Carried to its extreme, a holding that a deprivation of property in a manner inconsistent with state law cannot be a taking would have the result in most states that there never could be a taking without just compensation in violation of the fifth amendment. Since most state constitutions prohibit takings without just compensation, see list at 2 Nichols on Eminent Domain § 6.1[3] nn.28 & 29 (1982 & Supp. 1983), such takings would always be inconsistent with state law in those states.

⁷In *Agins v. Tiburon*, 447 U.S. 255 (1980), the plaintiffs claimed that the enactment of zoning ordinances which restricted plaintiffs' use of their property constituted a taking. The Supreme Court held that there had as yet been no taking because the plaintiffs had not submitted a development plan and the ordinances therefore had not been applied to the plaintiffs. The plaintiffs were thus "free to pursue their reasonable investment expectations by submitting a development plan to local officials." 447 U.S. at 262. Hamilton is in a different position, having submitted a plan which was disapproved for reasons which imply disapproval of any plan which would fulfill Hamilton's reasonable investment-backed expectations.

dez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd after remand*, 699 F.2d 734 (1983). Since it is the application of the laws or regulations which effectuates the taking, it makes no difference for fifth amendment purposes whether the particular application is consistent with state law.⁸

Although an unlawful application of zoning regulations can constitute a taking, the question remains whether damages are an appropriate remedy. This question was presented to the Supreme Court in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). There the Court was asked to rule that a state must provide damages to a landowner who has suffered a regulatory taking. The California court had held that only injunctive relief was available. Although this question was not

⁸The irrelevancy of the taking's validity under state law is illustrated by *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981). In that case, the developer of a condominium project claimed that his property had been taken when he was denied permission to finish the project, after obtaining approval of his plans and constructing common improvements and part of the condominiums, because the zoning laws had been restrictively amended. A state court, in a separate suit, had declared application of the zoning amendments invalid. The appeal of the state court suit had not yet been decided. Although the Third Circuit held that no taking had occurred because the property retained considerable value, its value having been reduced by the zoning amendments from about three million dollars to about two million dollars, it did not consider the possibility that the invalidity of applying the zoning amendments would preclude a finding that a taking had occurred. See also *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983) (redevelopment plan undertaken by authority of state Rehabilitation Act, but in violation of that act, effected compensable taking under fifth amendment); *Urbanizadora Versalles, Inc. v. Riviera Rios*, 701 F.2d 993 (1st Cir. 1983) (temporary "freezing" of property in violation of state law held a taking).

answered by the majority of the Court, which held the case non-justiciable for lack of a final order, it was discussed by Justice Brennan in his dissent. The dissent was joined in by four justices. Justice Rehnquist, concurring with the majority, said specifically that he "would have little difficulty agreeing with much of what is said in the dissenting opinion of Justice Brennan," 450 U.S. at 633-34; and the majority opinion itself noted that the constitutional merits of the claim were "not to be cast aside lightly," *id.* at 633.

The dissent, which therefore represented the views of a majority of the Court on this issue, reasoned that the language of the fifth amendment prohibits taking without just compensation, and so a constitutional violation has occurred as soon as an uncompensated taking is effected. The government's duty to pay compensation then arises from the constitutional violation, not from any implied promise or agreement. The dissenting opinion also looked to the purposes of the just compensation clause, stating:

Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.

Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which in all fairness, should be borne by the public as a whole. . . . If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the reg-

ulation and the government entity's rescission of it. The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken.

450 U.S. at 655-57 (footnotes deleted). Justice Brennan therefore thought that:

[O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

450 U.S. at 653 (footnotes deleted). We agree with Justice Brennan's reasoning and hold that compensation must be paid for a temporary regulatory taking.

The jury's finding that the planning commission effected a taking of Hamilton's property was therefore supported by the evidence, and judgment notwithstanding the verdict was improper. The jury was correctly instructed on the question of damages under the theory of a temporary taking and awarded \$350,000 in damages. This amount is supported by expert testimony, so Hamilton is entitled to the jury's verdict and judgment should be entered in its favor for \$350,000.

III

The District Court granted directed verdicts in favor of the planning commission on Hamilton's substantive due process and equal protection claims. On appeal, Hamilton now argues that these rulings were in error. However, Hamilton presents these arguments as an alternative to its

taking claim and asks for no relief beyond that requested under the taking claim. In light of our decision on the taking question, therefore, we need not reach these issues.

Hamilton also appeals the District Court's denial of attorneys fees under 42 U.S.C. § 1988. That statute by its terms provides that an award of attorney fees is a matter for the discretion of the court. We must, therefore, remand the case so that the District Court may exercise its discretion in determining whether Hamilton is now entitled to attorney fees.

Accordingly, the judgment of the District Court is reversed and remanded for proceedings consistent with this opinion.

WELLFORD, Circuit Judge, dissenting.

I would agree with the majority's conclusion that "the Supreme Court has not set forth a clear standard by which to determine whether particular conduct amounts to a 'taking' under the fifth amendment."¹ I would also agree with its conclusion that "the purpose served by the Planning Commission's actions now in dispute . . . [is] . . . a legitimate public purpose." It seems clear that depriving the owner of the most profitable use of land and the fact that governmental planning or zoning action substantially diminishes the value of land does not amount to a taking. *Penn Central Transp. Co. v. New York City*, 438

¹"There is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), cited by the dissent in *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S. Ct. 3164, 3179 (1982).

U.S. 104 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1936).

The testimony of the Bank's expert, Hunt, in this case was that if the Planning Commission's actions, as interpreted by the Bank's employee (Ragsdale) would admit only 67 additional building sites on the contested property, and would eliminate 409 potential building sites from the development plan, there would be a loss in excess of \$1,000,000 to the developer. Hunt was of the opinion, based on this assumption, that the property would have no significant market value "other than that which someone would pay for open space." Examination of the record before us, however, indicates that it was virtually conceded that even applying 1979 standards a total of 548 units would be approved on the property. If the elimination of 409 potential units would leave a substantial number yet to be developed. There was no evidence of a formal request by appellant for a variance to permit as many as 267 additional allowable dwelling units for future development as set out on the original 1973 preliminary plat and approved by the Planning Commission on later occasions; rather, appellant insisted that it had vested rights to develop 409 (or more) potential units. In sum, evidence in the case does not clearly indicate to me that economically viable use of the property was denied.

Even if the jury verdict in this case did establish a temporary deprivation and a denial of economically viable use of a part of the property, as apparently the district judge concluded that it did, I would agree with his ultimate holding that "... the temporary interference with the plaintiff's development backed expectations and any

temporary diminution in value of the property, whether styled as a "temporary taking" or otherwise, ... is essentially a question of law." He concluded that under the circumstances plaintiff was not entitled to damages as a matter of law since it could proceed under 1973 zoning regulations by reason of estoppel. Defendants, moreover, have insisted all along that plaintiff has never been in compliance with the 1973 zoning laws and regulations pertaining to allowable slope (building on a lot in excess of 25 degree slope not permitted) and with respect to some reduction of allowable units on the property because of elimination of some of the acreage by reason of its acquisition by a public authority for other purposes.

This case is really a quarrel over to what extent a "cluster" development of residential units is permitted on a parcel of land. The zoning ordinances or regulations on their face do not amount to a taking of the Bank property, which was acquired with notice of the application of these ordinances and regulations made by defendants. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). I agree with the trial judge's conclusion that there has not been any taking requiring judgment under the Fifth Amendment.

Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939). See *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (CA 8), cert denied, 444 U.S. 899

(1979); *Reservation Eleven Associates v. District of Columbia*, 136 U.S.App.D.C. 311, 315-316, 420 F.2d 153, 157-158 (1969); *Virgin Islands v. 50.05 Acres of Land*, 185 F.Supp. 495, 498 (V.I. 1960); 2 J. Sackman & P. Rohan, *Nichols' Law of Eminent Domain* § 6.13[3] (3d ed. 1979).

Agins, n.9 at 263.

The judgment of the California Supreme Court in *Agins* that the sole remedies available in an inverse condemnation claim, arising out of zoning activity similar to that made by the Bank here, were mandamus and declaratory judgment, was not disturbed by the United States Supreme Court.

There has been no physical invasion by defendants of plaintiff's property, either temporary or permanent. A "taking" of the property can be less readily found under these circumstances. *Penn Central Transp.* at 124; *Loretto v. Teleprompter supra*.

More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (prohibition of industrial use); *Goriet v. Fox*, 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt)

Penn Central Transp. Co., at 125.

The Supreme Court in *Agins* did not decide whether the state (or defendants in this case acting as agents of

the state) must pay damages to a landowner when claiming a taking under a regulatory ordinance, because it found no taking had been established. That same issue arose in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), and Justice Blackmun, writing for the majority, stated, "we again must leave the issue undecided." 450 U.S. at 623, and see n.9 at 629. I do not interpret Justice Rehnquist's concurring opinion in *San Diego* as adopting the reasoning of the minority four Justices in that case, a temporary taking by reason of regulatory actions pursuant to zoning ordinances should be viewed in the same fashion as a permanent taking. Justice Rehnquist states only: "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633 (emphasis added). See also, *Loretto v. Teleprompter, supra*, wherein the majority² pointed out:

The Court concluded [in *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958)] that the temporary though severe restriction on use of the mines was justified. . . .

102 S.Ct. at 3174.

The Supreme Court seems to imply that in a temporary taking where there is no invasion, physical occupation, or "seizure and direction" by the state of the landowner's property, no compensation is mandated. *Central Eureka* is cited, as apparently still good law in *Teleprompter*, 102 S.Ct. at 3174. In *Hadacheck v. Sebastian*,

²Justice Brennan, dissenting; Justice Rehnquist with the majority.

239 U.S. 394 (1915), where 87½% of value was taken by an ordinance precluding existing use, no compensation was found due.

Even if the trial judge reached his decision that compensatory damages were not allowable on the rationale that the zoning regulations were being applied in a manner inconsistent with Tennessee law, I would conclude that he, nevertheless, reached the right decision. Properly considered, there was questionable evidence in this case, at best, that all economically viable uses of the property had been even temporarily taken, or that reasonable "investment-backed expectations" had been arbitrarily eliminated. Plaintiff succeeded, moreover, in obtaining a declaratory judgment and injunction requiring that 1973 ordinances and regulations apply to future development of its property. I would not disturb the district court's decision in that respect.

In summary, I would conclude that the effects of defendants' actions did not "completely deprive the owner of all or most of [its] interest in the property." *San Diego*, 450 U.S. at 653. See, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). I would conclude further than even a temporary deprivation of the Bank's "investment-backed expectations under the circumstances here does not establish an entitlement to compensatory damages. I do not agree that Justice Brennan's dissent in *San Diego* represents the views of a majority of the Supreme Court on this issue. The majority has not cited a single case allowing compensatory damages in a case where there has been a temporary interference with a landowner's right to develop his property in some economically viable fa-

shion by reason of zoning actions, not involving an invasion of the property, occupation of it, or temporary seizure and possession of it.

Cases cited by the majority do not, in my view, support the result which they reach. *Urbanization Versailles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983), for example, held that a landowner whose property had been completely frozen by state zoning and regulatory actions, was entitled to declaratory and injunctive relief, but not to compensatory damages. *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980), held that no taking at all had occurred. *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. General Motors Corp.*, 323 U.S. 373 (1945), and *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), all involved condemnation actions by the federal government for complete temporary taking of a fee, or a leasehold, or part of a leasehold. All are inapposite here. *United States v. Cansbey*, 328 U.S. 256 (1946), involved the setting aside of a Court of Claims award for a taking because of airplane overflights. The pertinent holding in *Hernandez v. City of Lafayette*, is as follows:

However, in cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to a result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification, [by petitioning for rezoning, or contesting the initial general zoning regulation prior to its passage] we conclude that a "taking" does not occur until the municipality's governing body is given a realistic

opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.

During the pendency of such proceedings to review and correct a zoning classification that denies an owner any economically viable use of his property, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense.'" *Agins v. City of Tiburon*, 447 U.S. at 262-63 n.9, 100 S.Ct. at 2142-43 n.9 (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed.2d 240 (1939)). *Accord*, *Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (8th Cir.), *cert. denied*, 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979); *Reservation Eleven Associates v. District of Columbia*, 420 F.2d 153, 157 (D.C. Cir. 1969).

643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982), *aff'd after remand*, 699 F.2d 734 (1983).

In a footnote, the court further stated:

We believe that such a rule is consistent with the "weight of authority . . . that in order to constitute a taking, the condemnor must have an intention to appropriate. . . ." *Porter v. United States*, 473 F.2d 1329, 1336 (5th Cir. 1973). *Accord*, *J. J. Henry Co. v. City State*, 411 F.2d 1246, 1249 (Ct.Cl. 1969). The City of Lafayette under the circumstances of this case would lack an intention to deny plaintiff an economically viable use of his property until it was put on notice that its zoning regulations were effecting such a denial. *But see San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).

Thus, for the reasons stated, I respectfully dissent from the opinion of the majority and would affirm the decision of the district judge.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5388
82-5432

HAMILTON BANK OF JOHNSON CITY,
Plaintiff-Appellant,
v.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PETITION FOR REHEARING EN BANC
ON BEHALF OF DEFENDANTS-APPELLEES
WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL.

(Filed March 21, 1984)

Robert L. Estes
M. Milton Sweeney
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Appellees

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REQUIRED STATEMENTS FOR REHEARING
EN BANC

I express a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary

to the following decisions of the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

San Diego Gas & Electric Co. v. City of San Diego, 101 Sup. Ct. 1287, 450 U.S. 621 (1981).

Agins v. City of Tiburon, 447 U.S. 255, 65 L.E.2d 106, 100 Sup. Ct. 2138 (1980).

Penn Central Transportation Corp. v. New York City, 438 U.S. 104, 57 L.E.2d 631, 98 Sup. Ct. 2646 (1978).

Loretto v. Teleprompter Manhattan CATV Corp., 102 Sup. Ct. 3164 (1982).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether a developer such as Hamilton can claim an *unconstitutional "temporary" taking under the 5th Amendment by a planning commission* when, as here, it has never previously submitted nor had approved a plat of the particular property that complies with either an old (1973) zoning ordinance or subdivision regulation or amendments thereto (1977 & 1979) where neither the validity of the enactment of the amendments nor the enactment or application of the original ordinances and regulations has been questioned.

2. Assuming a temporary interference with an investors profit expectations has occurred, which we deny,

is the proper remedy one of money damages or simply the imposition of injunctive relief.

/s/ Robert L. Estes
Attorney of Record for
Defendants-Appellees

PETITION FOR REHEARING EN BANC

The Appellee Defendant, Williamson County Regional Planning Commission respectfully presents this Petition for Rehearing En Banc of the appeal of this matter and in support thereof, states as follows:

1. The appeal in this cause was argued before this Honorable Court of Appeals for the Sixth Circuit on August 4, 1983.

2. On March 7, 1984, the Court rendered a two to one decision in favor of the Appellant and against the Appellee, reversing the judgment of the District Court for the Middle District of Tennessee which had granted the appellee's motion below for a Judgment Notwithstanding the Verdict. The dissent by Judge Wellford, would uphold the lower Court ruling, as a matter of law, that there had not occurred a "taking" within the meaning of the U.S. Constitution.

3. Appellee seeks a rehearing en banc upon the following issues:

(A) Whether a developer such as Hamilton can claim an *unconstitutional "temporary" taking under the 5th Amendment by a planning commission* when, as here, it has never previously submitted nor had approved a plat of the particular property that complies with either an old

(1973) zoning ordinance or subdivision regulation or amendments thereto (1977 & 1979) where neither the validity of the enactment of the amendments nor the enactment or application of the original ordinances and regulations has been questioned.

(B) Whether the majority opinion erroneously ignored the transcript which clearly reveals that, although the District Court erroneously refused to submit the appellee's requests for a special Interrogatory and instructions to the jury on the issue whether Hamilton had submitted a plat (Exhibit No. 9702) that complied with the 1973 ordinances and regulations, the District Court correctly ruled on appellee's motion JNOV that as a matter of law Hamilton could not recover monetary damages for an unlawful temporary taking under the 5th Amendment.

(C) Whether, even assuming a temporary interference with an investor's profit expectations occurred, is the proper remedy one of money damages or is it simply the imposition of injunctive relief.

(D) Whether the finding by the majority opinion in this matter ignores substantial evidence that there were viable economic ways to develop the property by re-drafting the plot and that the Appellant had not been denied any economically viable means of development.

(E) Whether the majority's opinion in this matter is based solely upon an interpretation of the dissent in *San Diego Gas and Electric Co. v. City of San Diego*, 101 S.Ct. 1287, 45 U.S. 621 (1981), and upon a one-line remark by Judge Rehnquist contained in that opinion, and whether Judge Wellford's dissenting opinion correctly interprets the *San Diego Gas* case and later holdings.

(F) Whether the majority of the Court obviously ignores the plain facts presented on the plats that were submitted to the Planning Commission from time to time, which never showed lots plotted, nor developed in the areas now sought to be developed. Said plats contained language, which is clearly acknowledged by the majority, that those parcels *could not* be developed until *further* approval was obtained from the Planning Commission.

ARGUMENT

Both the majority and dissenting opinions in this matter agree that at this time the Supreme Court has not set clear standard as to what conduct amounts to a "taking" under the Fifth Amendment. The majority by interpreting what it finds to be the *implicit* holding in the *San Diego Gas* case, *supra*, relies upon a statement made by Judge Rehnquist and the dissent in that case. To rely upon Judge Rehnquist's statement "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan", leaves *much* to be desired to find such a statement is tantamount to a ruling of law. The majority's view which could be determinative of monumental issues, such that could affect thousands of planning commissions, like the Williamson County Planning Commission, and cost the public literally billions of dollars in damages should not be supported by the words "little" and "much". Judge Wellford in his well-reasoned dissent, clearly recognizes that Judge Rehnquist's statement could not and should not be used as a basis of

the opinion by the majority of this Court. Judge Wellford in his dissent clearly shows that in the later case of *Loretto v. Teleprompter*, 102 S.Ct. 3164 (1982) where Judge Rehnquist decides with the majority, that the majority's opinion in this case, relies erroneously on what it only thought Justice Rehnquist's opinion to be.

It is submitted that the majority by the language contained in this opinion is inviting an appeal of this issue to the Supreme Court for a final determination. While it is agreed that this is an issue that the Supreme Court perhaps should decide, *this* is not the case to properly present the issue to the Supreme Court of the United States.

The majority's opinion of the Court obviously disregards substantial evidence in the case or perhaps it failed to review certain exhibits that were before the Court that would clearly dictate that the District Court judge's granting of the Judgment Notwithstanding the Verdict was proper. The Sixth Circuit Court of Appeals in prior decisions supports the action by the district court in the present case in its holding in the case of *O'Neill v. Kildejian*, 511 F.2d 511 (6th Cir. 1975).

The majority ignores the District Court's focus of its ruling on the narrower issue of whether or not there has been a violation of the Fifth Amendment. Even viewing the evidence in that regard most favorably to the Bank, *it is without question that the bank's failure to present for approval a preliminary plat that met, at a minimum, the standards in effect in 1973 prohibits the bank, AS A MATTER OF LAW, from obtaining a judgment* in its favor for a violation of the Fifth Amendment.

The majority's opinion erroneously merely looks to the standard of review as to whether there was sufficient evidence presented to raise a material issue of fact for the jury when the District Court considered the motion for Judgment Notwithstanding the Verdict whereas, the Planning Commission's position is that there could not be sufficient evidence presented to raise a material issue of fact for the jury not because plaintiffs fail to introduce sufficient evidence but because the planning commission was entitled to a judgment as a matter of law regardless of the weight and sufficiency of the evidence presented by Hamilton.

Judge Wellford correctly views the lower Court's holdings and states:

"Even if the jury verdict in this case did establish a temporary deprivation and a denial of economically viable use of a part of the property, as apparently the district judge concluded that it did, I would agree with his ultimate holding that '... the temporary interference with the plaintiffs' development backed expectations and any temporary diminution in value of the property, whether styled as a 'temporary taking' or otherwise, ... is essentially a question of law.' He concluded that under the circumstances plaintiff was not entitled to damages as a matter of law since it could proceed under 1973 zoning regulations by reason of estoppel. (Page 16 of the Court's Opinion).

Judge Wellford's view of the evidence, we agree is the correct view, is as follows:

Property considered, there was questionable evidence in this case, at best, that all economically viable uses of the property had been even temporarily taken, or that reasonable "investment-backed expectations" had been arbitrarily eliminated.

The majority's opinion erroneously assumes that the jury's finding on the estoppel claim which was merely that the planning commission was estopped to apply the amended 1979 standards whereas the majority's opinion erroneously concludes that the jury found on the estoppel issue that Hamilton had acquired a right to develop Temple Hills according to the plats that had been submitted. This was *not* the issue on estoppel. The issue on estoppel was whether the planning commission had the right to amend its ordinances and regulations and apply those amended ordinances and regulations after the development had been begun.

The issue that should have been submitted by the District Court Judge as requested by the planning commission in both its request for a special interrogatory and instructions to the jury was whether Hamilton had submitted a plat to the planning commission which was before the District Court that complied with any ordinances and regulations and particularly the 1973 ordinances and regulations. The District Court refused to submit that issue to the jury, but corrected that error when it granted the planning commission's motion for judgment notwithstanding the verdict by finding that as a matter of law Hamilton Bank had not submitted the jury an issue of fact regarding an unlawful temporary taking under the Fifth Amendment. Thus, the District Court reached the right decision although it is conceded that it may have given the wrong reason for that decision in this memorandum of opinion.

The majority's opinion erroneously concludes that "the District Court '*apparently concluded*' as a matter of law" that without the application of zoning regulations in

a manner impermissible under state law, as established by the estoppel verdict, there could not be a taking; whereas, actually the District Court did not find an impermissible application of zoning ordinances and regulations but merely found that otherwise valid 1977 amended ordinances and regulations did not themselves apply to this subdivision and that the early 1973 ordinances and regulations did apply. Therefore, the District Court did not find that the planning commission was impermissibly applying the 1977 regulations or the 1973 regulations, but merely found that they were applying the wrong regulations. That even if the planning commission had applied the 1973 regulations, the plat that Hamilton Bank submitted which was disapproved and upon which they are basing this lawsuit does not comply with those 1973 regulations and therefore Hamilton Bank presented no jury triable issue of fact regarding an impermissible taking under the Fifth Amendment. Thus the planning commission was entitled to a Judgment Notwithstanding the Verdict.

The majority's conclusion on page 13 that "the jury was correctly instructed on the question of damages under the theory of a temporary taking and awarded \$350,000 in damages" erroneously ignores the fact that the jury's verdict was prevented from being valid since the planning commission was entitled a judgment as a matter of law since the bank had never submitted a plat that was capable of approval under either the 1973 or 1979 ordinances or regulations.

As part of the appendices to the briefs filed in this matter, plaintiff's exhibits nos. 9700 and 9701 reflect preliminary plats that were submitted from time to time by the appellant and its predecessors to the planning commis-

sion. By comparing those exhibits with the plaintiff's exhibit no. 9702, which was first submitted to the planning commission for approval in June of 1981, the changes that are reflected on the latter plat (plaintiff's exhibit 9702) for the *first* time shows building sites, roads and other improvements in the area sought to be developed. The majority's opinion (at page 10) indicates that the commission approved the preliminary plats on numerous occasions with the knowledge that a "total of 736 units were intended", and found that this "was the developer's primary expectation concerning the use of the parcel" citing *Penn Central Transportation Corporation v. N. Y. City*, 438 U.S. at 130.

The majority quotes Hamilton as introducing at trial a letter signed by six members of the 1973 planning commission stating that 736 units had been approved while ignoring the face of all the plats that were submitted prior to the ones submitted by Hamilton in June of 1981 which stated on the *face* thereof that "This parcel not to be developed until approved by the planning commission" and "Parcels with Note 'This parcel not to be developed until approved by the planning commission' not part of this plat and not included in gross area" and "Actual Dwelling units presented this Initial Sketch Plan 469."

The majority's opinion cites the various times during 1973 and 1979 that the various plats were submitted and renewed, but fails to note that the transcript clearly shows those plats were not for any of the property that is now in dispute and that all those plats contains the foregoing restrictions on the face of thereof which clearly excepts the property which is now in dispute from approval.

The majority's holding would indicate simply because the total number of dwelling units indicated on the plats, which related to gross area of the plat, gave the Bank and its predecessors a vested right to develop that number without regard to the fact that the note contained on the plat clearly indicate that the area sought to be developed was not part of that plat. The total number of units shown on those preliminary plats and approved was only 469.

The United States Supreme Court has never *explicitly* held that the regulations which *permanently* deprive an owner of all reasonable beneficial use of his property constitutes a "taking" of that property. The courts have found, however, that where restrictions do constitute a "taking" of property because it precluded a reasonable use, the remedy has been to invalidate the regulations that place such restrictions upon the property. This is, of course, not to say that by any consideration of the evidence in this case that there has been any deprivation of the Bank's rights.

The decision in *Agins v. City of Tiburon*, 23 Calif. 3rd 266, 157 Calif. Rptr. 372, 598 Pac.2d 25 (1979), and affirmed 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), is very close in point to the factual situation concerned in the present case. In the *Agins* case, there had not been submitted a plan for development of the property. It is submitted that the same exact situation exists in this case, for the Plaintiff has not presented a plan for development that is in compliance with either the zoning ordinances and subdivision regulations in effect in 1980 and 1981, nor those that were in effect in 1973. In the *Agins* case, the court refers in Footnote 9 to the issue presented as follows:

... Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are "incidents of ownership". They cannot be considered as a taking in the constitutional sense. *Danforth v. United States*, 308 U.S. 271, 285, 60th S.Ct. 231, 236 L.Ed. 240 (1939).

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922), although the court found that the regulation involved did amount to a "taking", the remedy was to invalidate the regulation rather than award compensatory damages or mandate formal condemnation of the property.

It is suggested that there is no authority whatsoever to find a "taking" where, as in this case, the property owner cannot establish its rights under earlier ordinances and regulations. If the property cannot now be developed under either set of regulations, then there cannot be a "taking" of any type. It is the topography of the land that is left for development after the condemnation of 18.5 acres that prevents its development yielding as large a number of buildable units as the bank desires.

In this case, both the District Court and jury found that the bank received all prerequisite due process, both substantive and procedural; further, the District Court has found that the zoning ordinances and subdivision regulations as applied by the planning commission to the plat submitted by the bank were "rationally applied". Before there can be a "taking", there must be some right or thing in existence, to which a person is entitled to protection, which is diminished or removed from that person or

entity. Without some prior approval of a plat for that portion of the property the bank acquired no rights which could be violated. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, L.Ed.2d 230, 82 S.Ct. 987 (1962); *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 47 S. Ct. 114 (1926); and *Gorieb v. Fox*, 274 U.S. 603 (1927).

The majority's opinion also states that there was no remaining economically viable use of the bank's property and based that finding solely on the testimony of the bank's expert, Mr. Hunt, whose testimony was based upon the interpretations given to him by the bank's employee, Mr. Ragsdale. The majority finds "as there was no convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use (page 8 of the opinion). The Majority totally ignores the testimony of other qualified experts, Mr. Mort Stein, the county planner, and that of Mr. Thayer Martin, the county engineer, who testified that the property could be developed so that approximately 558 building units could be located thereon in spite of the conformity with, and despite the Planning Commission's eight objections to the plat that Hamilton Bank did submit to the Planning Commission in June of 1981, which was disapproved and on which this lawsuit was filed and is based. (Transcript Page 1570, Joint Appendix p. 419.)

The majority even concedes that if there could be 336 additional units built on the property then the development would retain economically viable use. (See footnote 5

page 8 of the majority's opinion.) Judge Wellford in his dissent, after apparently fully examining the record, finds "Examination of the record before us, however, indicates that it was virtually conceded that even applying 1979 standards a total of 548 would be approved on the property." This figure (548) less the 212 already platted and approved equals 336 additional building sites. As the Majority concedes this number would constitute a viable economic use.

As Judge Wellford points out the "cases cited by the majority do not, in my view, support the result which they reach, (Dissenting opinion page 19.) And in particular he cites the pertinent holding of *Hernandez v. City of Lafayette*. (See page 20 of this opinion)

For the numerous reasons set forth above this Petition for Rehearing should be granted and due to the extremely important constitution issues submitted it should be heard En Banc.

Respectfully submitted,

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615/244-6538

CERTIFICATE

I, M. Milton Sweeney, do hereby certify that a true and exact copy of the foregoing PETITION FOR RE-

HEARING EN BANC has been hand delivered to Mr. G. T. Nebel, counsel for Plaintiff-Appellant, this the 21st day of March, 1984.

M. MILTON SWEENEY

No. 82-5388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
HAMILTON BANK OF JOHNSON CITY,

Plaintiff-Appellant,

v.

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Defendants-Appellees.

O R D E R

Before: KEITH, KENNEDY, and WELLFORD, Circuit Judges.

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT
John P. Heleman,

Clerk

*Testimony of Thomas Ragsdale
Direct Examination by Nebel*

(p. 49) prepared by the developer and submitted to the Planning Commission, is that correct?

A. That's correct. This was prepared by Mr. Leon — excuse me, Lytle Brown, and Mr. Leon Howard, who is a golf course designer.

Q. You were the county planner back at that time, but when you were the county planner, please tell us what would happen when a developer would bring a plat like that into your office. What was your job?

A. All right. The first thing I would do is take the zoning ordinance and I would review that, then review the plat. That was the first and foremost.

Q. Why?

A. Because the zoning ordinance is superior to the subdivision regulations. The zoning ordinance is approved by the County Court. Not by the Planning Commission. It is a legal instrument in terms for zoning. The subdivision regulations are merely approved by the county Planning Commission and they are not as binding as the zoning ordinance. The zoning ordinance is actually a law approved by the legislative body of the county, whereas the subdivision regulations aren't.

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*Testimony of Thomas Ragsdale
Direct Examination by Nebel*

(p. 54) cases blocks of certain length. You would have the location of your water lines, the location of your sewer

lines, the different requirements that may be required of water pipes and sewer pipes, if that would pertain. You would also have the requirements of the survey of the piece of property. You know, that the lots would actually be exactly what they said they were. Those would be the kinds of items that would be on there.

Q. All right. Now you are the only one that's seen it, you have made your evaluation as to whether it meets the requirements of the subdivision regulations and the zoning ordinance.

Do you have authority to approve it yourself as the county planner or what do you do with it next?

A. Oh, no. What I would do, then, in the preparation of the agenda, I would put of course the name of the development and a little background of development, and if the development met all the criteria set out in these regulations, I would write down the staff recommends approval. If it didn't meet all of those criteria, or if I saw somewhere where the plat could be improved, I would make a note on the plat, describing that to the

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*Testimony of Thomas Ragsdale
Direct Examination by Nebel*

(p. 80) A. All right. I worked with the Planning Commission on all of the zones and districts, when we went through to see those that we were going to take out and those that we weren't, I worked with Mr. Vance Little and Mr. Callicott on the new cluster, and the ten percent was added to the new cluster in 1977. We also worked on the map, the zoning map, and all of the parcels that were going to be on the zoning map to identify the different zones.

Q. We'll get to that a little bit later. But you did specifically address Temple Hills and the other cluster developments that were in existence in 1977 and whether or not they would be covered by the '77 amendment?

A. Yes, we did.

Q. All right. Please tell us what the discussions were and what the result was.

A. The discussions at that time were that the existing clusters would not come under the 1977 zoning ordinance because they were already in existence. They would be evaluated under the 1973 zoning ordinance.

Q. Why? What was the policy?

A. Well, the reason for that was because all

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*Testimony of Thomas Ragsdale
Direct Examination by Nebel*

(p.106) Q. All right. What plat was that? The one that had been renewed?

A. Well, that plat was one that had been adjusted over time for all the changes that had taken place in the subdivision.

Q. All right.

A. The one that had the reserve parcels approved by the Planning Commission and changes, it had those changes on them, it had a list of dates when all the plats had been approved.

Q. Was it the same plats that had been approved in April of 1978?

A. Yes, sir. It was essentially the same plat.

Q. Why did you submit the plat that had been approved in 1978 and another plat?

A. Well, we felt like our rights went back to 1973, the plat that existed in 1973 was a valid plat. But in an effort to work with the commission, we were trying to go out and redesign and show those areas that were reserved parcels as how they would be developed. They asked us to do that and we tried to cooperate and work with them, but we felt like our rights under '73 were still valid.

Q. All right. What action did the Planning (p.107) Commission take in October of 1978?

A. They turned down —

Q. 1980, excuse me.

A. They turned down the request.

Q. Did they give you any reasons?

A. Yes. They did.

Q. All right. What did you do after the Planning Commission turned you down?

A. Well, the secretary of the Planning Commission wrote us a letter.

Q. Who was the secretary?

A. Mrs. Ann Peterson.

Q. All right. To whom did they address the letter?

A. I believe it was to Jim Patterson.

Q. Go ahead.

A. But there was a letter that came to Mr. Patterson and it outlined the reasons why they were being turned down, and at that meeting, at the Planning Commission meeting that night, we had asked, you know, where do we get relief from their actions? And she in her letter told or gave us direction to the Board of Zoning Appeals, and gave us a copy of the zoning ordinance, which outlined the powers and duties of the Board of Zoning (p. 108) Appeals. So that's where we went to next, went to the Board of Zoning Appeals after that.

Q. When did you go there?

A. It was in November, around the 10th of November, I believe.

Q. What questions did you put before the Board of Zoning Appeals?

A. Well, we asked them first what regulations we came under, '73 or '77. That was the first question.

Q. All right.

A. The second question was how they computed slope on lots for the project. And the third question was whether or not we could have—include the take area as open space.

Q. All right. Now were you the individual who actually made the presentation on behalf of the developer to the Board of Zoning Appeals?

A. Yes, I was.

Q. What action did the Board of Zoning Appeals take?

A. The Board of Zoning Appeals —

MR. ESTES: I believe the best evidence of that would be the opinion of the Board of Zoning Appeals. I think they have that (p. 109) available.

MR. NEBEL: We intend to introduce that in a moment. I was just laying the foundation. I'll be happy to wait until that time, Your Honor.

THE COURT: All right.

BY MR. NEBEL:

Q. What happened following the Board of Zoning Appeals meeting?

A. Well, the Board of Zoning Appeals approved —

Q. Well, what happened after the meeting? What was your next step in connection with Temple Hills? Did you work any more for Mr. Patterson?

A. Very short period of time after that.

Q. All right.

A. I worked for Mr. Patterson. As I told you before, I quit work for Mr. Patterson in December of '80.

Q. All right. You have already testified it was shortly after that period of time you went to work for Hamilton Bank in Johnson City?

A. That's correct.

Q. All right. Tell us what actions you took with regard to Temple Hills after going to work for Johnson City in terms of getting the plat approved.

(p. 110) A. I went to see Morton Stein and I told him what had transpired.

Q. You mean Hamilton?

A. Yes, and I was at that time working for Hamilton.

Q. All right.

A. I told him that I was going to sit down with Hamilton and take a look at the plat and see, you know, where we could improve it or adjust it to try to work with them. Again, we weren't giving up any of our rights under the '73 plat. So I took the plat and I took the results of that meeting and redesigned to some extent the plat, then I think it was in March we went to the Planning Commission and requested to have a hearing, an informal hearing, so that they, the Planning Commission, could meet the new owner, the Hamilton Bank, and the Hamilton Bank can field any questions that they had and then take a look at the plat. Then we would come back at a later date with a formal request for approval and that was in June of '81.

Q. June of last year?

A. Yes, sir.

Q. All right. Now don't tell us what the Board of Zoning Appeals decided, but did you at any (p.111) time bring up the Board of Zoning Appeals — the opinion of the Board of Zoning Appeals to Mr. Stein?

A. Yes.

Q. What was his response?

A. Well, he said that the Board of Zoning Appeals' opinion meant nothing.

Q. Did he indicate that the Planning Commission did not regard itself as bound by the Board of Zoning Appeals?

A. That's correct.

Q. What was the result of the June 18th, 1981, Planning Commission meeting when they considered the request of Hamilton Bank of Johnson City, they being the plaintiff?

A. They turned down the request.

Q. All right. Now who was on the Planning Commission at that time?

A. You mean the individual members?

Q. Yes.

A. Mr. McNeal, Mr. Baugh, Mr. Medaugh, Mr. Miger, Miss Waters, Mr. Kelly, Mr. Beard. I believe that was it.

Q. Were those the same individuals who had approved the Planning Commission or the Temple Hills project back in 1973 or had composition of

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*Testimony of Thomas Ragsdale
Direct Examination by Nebel*

(p. 115) Q. So that's back in 1973?

A. Yes.

Q. So back in 1973, 260 some odd acres were taken out of the development right away and an easement granted to the county?

A. Right. Then the construction of 27 holes with the tees and the underground sprinklers and the club house and maintenance shed and all that type of thing.

Q. What kind of investment roughly was made in putting in the off site sewers? You said they came from

Bellevue and were run to the project. With the off site sewers and the other preparation that was done and the golf course, what kind of investment was made between 1973 and, say, 1975?

A. I would say somewhere between three million and five million dollars. Somewhere in that—about five million dollars' total off site with the development, with the golf course and the sewers and all that.

MR. ESTES: If the court please, I object and move to strike unless he knows of his own knowledge. I suspect he doesn't.

MR. NEBEL: I think I can establish that by asking one or two more questions, Your

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*Testimony of Thomas Ragsdale
Direct Examination by Nebel*

(p. 132) A. Well, of course the Planning Commission was looking for a buildable site for a home. That was the first significance. The other significance would be is that the method in which the slope was computed in this case.

Q. All right. But tell us first of all whether there is any problem in Temple Hills concerning the method of calculating slope.

A. Well, the Planning Commission felt like there was a problem, the new Planning Commission felt like there was.

Q. When was the first time any problem was raised concerning computation of slope in Temple Hills?

A. Approximately 1980.

Q. 1980. If you will, please, describe how the problem was first raised and by whom.

A. Well, we submitted a series of maps, topographic maps, to the county in an effort to work out the problems that they felt had existed in the open space. The county engineer, Mr. Thayer Martin, took that map and colored all the areas that in his opinion were over 25 percent in grade. We got—we had a conference, I went down and took a look at the thing and I explained that the way he

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*Testimony of Thomas Ragsdale
Direct Examination by Nebel*

(p. 142) part of Temple Hills and that he felt like it was hurting his property. And so he wanted to come in and see if he could get something done about it by the Planning Commission, a change to those—to the way it was.

Q. All right.

A. And the Planning Commission called Mr. Patterson in and requested that, you know, he look at changing the design on the area next to Mr. Medaugh's house and Mr. Patterson presented plans to the Planning Commission. We reviewed them and they were approved to change the design in the area adjacent to Mr. Medaugh's house. This was the area where the reserved parcel had to be approved by the Planning Commission.

Q. So once again one of those reserved parcel areas was affected by this change, is that correct?

A. It was up on Sneed Road, yes.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 09054. I will ask you if you recognize that document?

A. Yes, I do. It's March 22, 1978 letter from me to Mr. Leon Stanford.

Q. All right. That shows the dates action was taken concerning Temple Hills?

(p. 143) A. That's correct. Mr. Leon had asked for a listing of dates that any action had gone down on Temple Hills.

Q. All right. I won't have you read those. I show you what's been marked for identification as Plaintiff's Exhibit 02051. Can you identify that document?

A. It's a staff report of April 20th, 1978.

Q. All right. What action was taken concerning Temple Hills? I believe it's item number four.

A. Yes. Request for renewal and revision of the Temple Hills preliminary plat. It recommended approval and the Planning Commission approved the renewal of the plat.

Q. Was this after the financial difficulties that Mr. Patterson had out there in Temple Hills?

A. I believe so.

Q. All right. Of course, in '78 it was after the new zoning ordinance and at least one change in the regulation, is that correct?

A. It was after the new zoning ordinance and the sub—yes.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 01056. (p. 144) Can you identify that document, please?

A. The minutes of Planning Commission from April 20th, 1978.

Q. All right. What action was taken there? That just corroborates that staff report you submitted as the last exhibit, is that correct?

A. Right. It's a developer of Temple Hills' request for renewal, revision of the preliminary plat. Motion was made and seconded and approved unanimously—carried unanimously.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 01057. I will ask you if you can identify this document?

A. These are the Planning Commission minutes from May 4, 1978.

Q. What action was taken regarding Temple Hills there?

A. Let's see, this is request for final approval, preliminary plat of Section Four, and it was a motion made by Robert Moran to grant final approval. It was approved.

Q. All right. What regulation was it approved under?

A. Section Four was approved under oil and chip or double surface treatment.

(p. 145) Q. How do you know that?

A. Well, it says so as you read on down. It says on Section Four they proposed to construct the road to base with JBST, that should be DBST, without curbs, until 80 percent of the homes were completed on each lot. At the time place curbs and final DBST and request a maintenance bond.

Q. All right. It says this motion was seconded by Sid Smith and unanimously carried?

A. That's correct.

Q. All right. Now DBST, that's oil and chip as you have indicated?

A. Yes. That's correct.

Q. At this time they already had on the books a requirement for hot mix?

A. Yes, sir.

Q. The Planning Commission specifically spelled out it would be DBST out there?

A. Yes. Yes.

Q. All right. I hand you Plaintiff's Exhibit No. 01060. I will ask you if you can identify that document.

A. Minutes from August 24th, 1978.

Q. What action was taken in that connection? On Temple Hills at that time?

(p. 146) A. It's a motion to revise final plat of Section One or phase one, Section Two, and they have got a motion or request for final approval of Section Five, Temple Hills Country Club Estates, Sneed Road.

Q. All right. What's the significance of that?

A. Well, this one was approved and it was also approved under the oil and chip requirements.

Q. I will hand you what has been marked for identification as Plaintiff's Exhibit 02062.

A. This is a staff report of April 5, '79.

Q. All right. If you will, turn to the third or fourth page on that document, please tell me what action was taken in connection with Temple Hills that time.

A. Okay. Mr. Stein and Mr. Demerick were there. Which page?

Q. Fourth page, I believe. Fourth page back on the staff report, 02062. Under item number three.

A. Right. This is a request for a preliminary plat—excuse me.

Q. I'm sorry, item two up above that, item number two.

(p. 147) A. Okay. Request for Jim Patterson, renewal of preliminary plat, Temple Hills Country Club Estates, Section — that's preliminary, and the background on the subdivision.

Q. All right. How many units are indicated at the background of that subdivision?

A. 736.

Q. This was the first meeting or one of the first meetings attended by Mr. Stein?

A. Yes, sir.

Q. Who prepared this staff report, you?

A. I believe I did.

Q. It was shortly after this that they began to raise questions concerning the number of units?

A. That's correct.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit No. 01065.

A. These are the April 5th, 1979 minutes.

Q. All right, sir. Was there any action taken concerning Temple Hills that night?

A. Item two, request for renewal of the preliminary plat of Temple Hills.

Q. What happened in connection with that request?

A. Well, Mr. Pitts announced it would be (p. 148) deferred for two weeks, but he was going to let anybody that wanted to speak that night to speak to the matter.

Q. All right.

A. And Bruce Hancock, the chairman of the interim homeowner's association, stood up.

Q. All right.

A. And addressed the commission.

Q. Mr. Stein, I believe the minutes reflect that Mr. Stein made a suggestion that night that they start keeping their minutes in abbreviated fashion, do you recall that?

A. I'm not sure it was—that was the date.

Q. If you take a look at page five on those minutes.

A. Page five, let's see.

Q. Item number 12, first paragraph.

A. On five?

Q. Page five.

A. Okay.

Q. Item number 12, first paragraph.

A. Okay.

Q. Exhibit 01065.

A. 01065. I'm on page five. There is no item 12 on this page.

(p. 149) Q. No item Roman numeral 12?

A. It's six or four, three, five and—

Q. May I approach the witness, Your Honor?

Do you recall Mr. Stein ever making a proposal to keep minutes in abbreviated form?

A. Yes, sir.

Q. Was that the way that you kept your minutes?

A. No, sir.

Q. Why not?

A. Well, first, I didn't keep the minutes. They were done by the secretary and reviewed by the secretary of the Planning Commission. But the policy of the Planning Commission at that time was to take detailed minutes so that both sides could be reflected in the minutes accurately.

Q. All right. I'll hand you what's been marked for identification as 01068. I will ask you if you can identify that document.

A. This is May 17th, 1979. The minutes from the Planning Commission.

Q. All right. If you will, turn to item Roman numeral four on the last page, tell me what the significance of that is.

A. Okay. Is a report from the planning staff (p. 150) concerning preliminary plat renewal policy and Mr. Stein is reporting to the Planning Commission about the plat approval procedure. He's recommending that all approvals in the future be approved under new regulations.

Q. All right.

A. When they are reapproved.

Q. All right. What would that mean in connection with Temple Hills in the hot mix standards, for example? Would that apply the hot mix standards to Temple Hills under that position?

A. Well, —

Q. Do you understand the question?

A. No, I don't.

Q. All right. Temple Hills, you have told us up to this point, has always been reapproved under '73 standards, we have seen minutes where the oil and chip was approved. Would this policy have any effect on Temple Hills if it had been adopted?

A. Yes, it would have changed what they would have had to do. But that's changing the rules in the middle of the game.

MR. ESTES: If the Court please, I move to strike that. That's a conclusion on his part that I don't think is warranted.

(p. 151) MR. NEBEL: Your Honor, he is an expert, he has a master's—

THE COURT: I'll strike the last comment changing the rules in the middle of the game. If he wants to talk about what the actual physical effect would be to go from one standard to another, he can do it.

MR. NEBEL: All right.

BY MR. NEBEL:

Q. As a planner, what would be the effect of going from a '73 standard to the newer standard in Temple Hills?

A. Well, the cost, of course, would just be astronomical to change over one plat to build it in terms of road, water and sewer. That the costs would just—they would be really a lot higher. And of course you would have to come back in and redesign all of his—you know, he will have to do a lot of redesign work on his roads and what not. There would be a lot of changes that he would have to make.

Q. All right.

THE COURT: Is this a convenient time to break?

MR. NEBEL: Yes, Your Honor.

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 176) Q. Were those reasons later advanced as reasons for denying the Temple Hills plat?

A. Yes, sir.

Q. That was despite the special committee's recommendation?

A. That's correct.

Q. I'm going to hand you what has been marked for identification as Plaintiff's Exhibit 9079. Can you identify that document?

A. Yes, sir. This is a letter from Mort Stein, Williamson County planner, to the Mid-Cumberland Council of Governments and Development District. The subject of it is A-95-review for the Temple Hills analysis.

Q. All right. Very brief, explain what the A-95 review involved.

A. Well, when I was working on the title ten program for the purchase and construction monies—

Q. That's for the area you showed us yesterday on that plat, that you wanted to get some money, really release the lien you said, and develop it?

A. Yes, sir. That's correct. And what this was, under the A-95 review process we had to go to the Planning Commission and get a letter saying (p. 177) that we conform with their regulations and their comprehensive plan. So on. I guess it was about June 7th, we went before the Planning Commission, again presented our plat,

and they approved or said that we complied with their 1973 adopted plan.

Q. All right. This was prior to the denial that took place later in 1979?

A. That's correct.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 9112. Can you identify that document?

A. This is a letter from Miss Ann Peterson, secretary of the Regional Planning Commission, to Mr. Jim Patterson.

Q. All right. Now we jumped out of order with Mr. Stein's letter. We went back there and we are in June of 1979 for a while. We are back on October 3, 1980.

A. That's correct.

Q. All right. Now this is a letter that was sent following that Planning Commission meeting, is that correct?

A. That's correct.

Q. All right. Now, if you will, please, tell me what significance that letter has.

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Testimony of Thomas Ragsdale
Direct Examination by Mr. Nebel

(p. 238) concerning the golf course has been to connect those two, I take it those two roads?

A. Yes, sir.

Q. All right. Your Honor, at this time we move for admission of Plaintiff's Exhibit 9702.

THE COURT: All right.

BY MR. NEBEL:

Q. All right. Mr. Ragsdale, this is plaintiff's Exhibit No. 9708. I ask you if you can identify this?

A. Yes, sir.

Q. Was this document prepared under your supervision and control?

A. Yes, sir.

Q. All right. Now what exactly does it reflect?

A. It reflects in the blue color, the units that are developed at the present time.

Q. All right.

A. It also shows in a hasher, those roads that are developed at the present time. In the yellow it shows lots that would meet the requirements that the Planning Commission has placed on us in the said eight requirements. Those being 125 feet at the road frontage, half acre in (p. 239) size, and those that are not on grades greater than 25 percent. The roads that you see, the white roads, are roads that we assume that we can cut to 25—to the 1973 ten percent requirement.

Q. This road right here?

A. Yes, sir.

Q. All right. Okay.

A. And down—

Q. Down here?

A. Yes, sir. The cul-de-sacs have been shortened to 800 feet, which are the requirements of the new regulations.

Q. You have eliminated any area back through here where they have objected to the long cul-de-sac?

A. Yes, combination of the long cul-de-sacs and their position of slope on the lots.

Q. All right. Now what is the orange area?

A. That is the area that is eliminated by the eight reasons the Planning Commission gave.

Q. All right. Now how did you come to that conclusion? Did you actually take the eight requirements that they had given you and match it to the property that was on the Temple Hills plat and eliminate the areas that didn't comply with the (p. 240) eight reasons they gave you?

A. That's correct. And all those units would be single family units.

Q. All right. Your Honor, at this time we move Plaintiff's Exhibit No. 9708 into evidence.

THE COURT: Okay.

BY MR. NEBEL:

Q. Mr. Ragsdale, this is Plaintiff's Exhibit No. 9707 and what does this show? How does this differ from the one we just looked at?

A. Well, it differs in that we have removed the roads on the assumption that we could not either get a variance or we couldn't cut the grades to the ten percent.

Q. That's this road down here?

A. Yes, sir.

Q. And this road up here, the two roads you are saying you removed?

A. That's correct.

Q. All right. Go ahead. Is that the only difference?

A. Well, we created a cul-de-sac off of Temple Road that was connected—well, to St. Andrews, connected all the way across, and that's the only difference.

(p. 241) Q. All right.

A. It's added more area that would be eliminated.

Q. All right. More orange (sic) on this one than there is on the other one?

A. Yes, sir.

Q. All right. Your Honor, we move Plaintiff's Exhibit No. 9707 into evidence.

MR. ESTES: If the court please, we object to those, both of these exhibits, as being his interpretation of what the Planning—one interpretation of what the Planning Commission's actions has done. I don't think he is qualified, first of all, to make that interpretation, and he hasn't testified this is the only solution. He's only testified that without any basis being stated that it would just take everything out.

Now the other map, where Mr. Martin, Thayer Martin drew in the areas that this slope's in excess of 25 percent, didn't show anywhere near all the area as shown in the orange (sic) on this map. I just don't think he's laid a proper foundation for entering these as exhibits.

MR. NEBEL: Your Honor, first of all, these maps are very important to the plaintiff to

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*Testimony of Thomas Ragsdale
Direct Examination by Mr. Nebel*

(p. 244) A. I think the plats can be developed today.

Q. How many houses have been built at Temple Hills as of today?

A. Approximately a hundred and forty-four.

Q. Since Mr. Stein has become county planner, how many subdivisions, excuse me, preliminary plats have been approved, new preliminary plats been approved in Williamson County?

A. Well, preliminary plats of this type scale or large scale, only one.

Q. That's since April of 1979?

A. That's correct.

Q. How does that compare during the period when you were the planner?

A. Well, there are a lot of plats being approved during that time period.

Q. That doesn't help. Just give us some estimate.

A. I would say there were probably 15 to 20 a year approved.

MR. ESTES: I object to this. He obviously doesn't know and he cannot just speculate.

MR. NEBEL: He just gave an estimate, Your Honor.

MR. ESTES: I object to the (p. 245) speculation.

THE COURT: He said that a lot, and then I think he was asked what did he mean by a lot, so I'll let him explain what he meant by his previous answer.

MR. Nebel: All right.

BY MR. NEBEL:

Q. Now, I believe you have already answered that and said what, 15 to 20?

A. Right.

Q. Per year?

A. By preliminary plats a year, yes.

Q. All right. Now in response to—strike that.

The 1980 subdivision regulations that were approved by the Planning Commission, they were approved in June of 1980. Did you do any work on drafting them before you left?

A. I worked initially on the organization of the subdivision regulations and I worked a little bit on the first chapter.

Q. All right. If you will please, what did you use as a guide in drafting that?

A. I used a model subdivision regulation guide put out by the American Society of Planning (p. 246) Officials.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 7526 and ask you to turn to Section 2.2 of those subdivision regs.

A. All right, sir.

Q. Is that a provision that you drafted?

A. No. I copied it from the model subdivision regulations on my original draft.

Q. All right, sir. But I mean in putting together a set for Williamson County, I'm not asking you whether you made up the words, I'm asking you whether in putting together that draft you incorporated that in the first draft that you did?

A. It was in the first draft, the first chapter that I worked on.

Q. All right. Now if you will read that provision to the jury.

A. 2.2, Savings Provision: These regulations shall not alter, modify, void, vacate or nullify any action now pending or any rights obtained by any person, firm or corporation by lawful action of the county prior to the adoption of these regulations.

(p. 247) Q. All right. Is that a provision that is frequently in planning regulations?

A. Yes, sir.

Q. Have you seen that provision before?

A. Yes, sir.

Q. In your course of study as a planner?

A. Yes, sir.

Q. Have you reviewed provisions like that?

A. I have seen it in a variety of subdivision regulations.

Q. And you have testified that came from the model code?

A. That's correct.

Q. Now what, as a planner, is the purpose of that provision?

A. Well, the purpose of this provision is that it gives the developer who starts a project the right to continue his project under the regulations he was approved under and not to make him follow new regulations approved after he got his original approval.

Q. All right. Now was that section ever adopted by the Williamson County Regional Planning Commission?

A. Yes, sir.

(p. 248) Q. When?

A. June of 1980 I believe.

Q. Did you ever bring that to the attention of the Planning Commission?

A. Yes, I sure did.

Q. That particular provision?

A. I sure did.

Q. What did they do?

A. They indicated it did not apply.

Q. You Honor, I think that may be it. I do need to move into this evidence, Exhibit No. 7526. And if I might have just one moment with Mr. Bailey.

THE COURT: All right.

(Pause.)

MR. NEBEL: Your Honor, we have subpoenaed some documents from the plaintiff (sic) that we have not yet had an opportunity to review. We may need to recall Mr. Ragsdale at some other point in time, but rather than wasting the Court's time now we are—

THE COURT: All right. Considering that it's approaching the noon hour, I would gather cross-examination would take more than 15 minutes?

MR. ESTES: Yes, sir.

THE COURT: All right. So why don't we

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Testimony of Thomas Ragsdale

Cross-Exam by Estes

(p. 262) A. Yes, sir.

Q. All right, sir. Now my question is, I asked the wrong question while ago, my question is at no time before Mr. Patterson submitted his plan in about September or October of 1980, was any more than that number of lots drawn in and submitted to the Planning Commission with the exception that there were some condominiums drawn in in Section Two, is that correct or not?

A. No, sir.

Q. Where are the others? You mentioned one or two others. Where are they?

A. Mr. Temple's place, right next—

Q. Right here?

A. Over a little bit. There, right in there.

Q. All right.

A. Close to there anyway. That one. And then Section Two were the only areas.

Q. How many lots were platted in there?

A. Only one lot and it's over a little bit.

Q. Over here?

A. To my left.

Q. All right.

A. Keep going, right in there, down below. Right in there. There was one there, then the

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*Testimony of Thomas Ragsdale
Cross-Exam by Estes*

(p. 265) plat and the sewer lines and the utilities we were talking about, all of these improvements, the millions you have been talking about the last two days that have been spent, all of these have been spent by Mr. Patterson in his development of that portion of the Temple Hills development that he developed and not by the Hamilton Bank since it took over, isn't that correct?

A. No, sir.

Q. Well, we all know, of course, that the predecessor, Hamilton Mortgage Company, loaned Patterson and his partners money.

A. Okay.

Q. To develop Temple Hills. There is no question about that. But I'm talking about as far as who actually directly spent the money. The Hamilton Bank, the present plaintiff in this lawsuit, has spent no monies whatsoever since they took over from Mr. Patterson to develop anything out at Temple Hills, have they?

A. That's correct.

Q. All right. You were reading from notes this morning talking about some research you did in several subdivisions and you read off rather hurriedly several different subdivisions. Do you

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*Testimony of Thomas Ragsdale
Cross-Exam by Estes*

(p. 284) THE COURT: All right.

BY MR. ESTES:

Q. I want to refer you to Defendants' Exhibit No. 15, which is a staff report of the Williamson County Planning Commission dated April 3rd, 1975, that is true?

A. Yes, sir.

Q. That staff report was prepared by you, was it not?

A. That's correct.

Q. All right. Down in item two the statement is made, is it not, that the staff examined the plat and found that the subdivision could not be built due to the fact that the slope in that area was 17 to 38 percent, and the soil was Dellrose Chilty loam with steep slope problems. Staff recommended that the plat not be approved for the above mentioned reasons. Is that correct?

A. Yes, sir. That's what my recommendation was.

Q. All right, sir. I would like to have that admitted as an exhibit.

THE COURT: All right.

BY MR. ESTES:

Q. I would like to refer you to Defendants' (p. 285) Exhibit No. 17, which is a staff report of the Williamson County Regional Planning Commission dated August 7, 1975?

A. Yes, sir.

Q. All right. And I believe that was prepared by you also, wasn't it?

A. Yes, sir.

Q. And under background it states that Squirrel Hill was originally approved on December 6th, 1973, and the plat was allowed to become void because no final plat was approved within one year of initial approval. That is a correct statement?

A. I believe that to be.

Q. All right. Further, on down on that page, the last sentence, staff felt that the plat should not be ap-

proved until further study could be made on slope, home sites and ditches. Is that correct?

A. Yes, sir.

Q. Over on page two in regard to Royal Oaks subdivision, item number five, background?

A. Item five, staff recommendation where I talked with Mr. Greer about it?

Q. No. Item five under that, background, second sentence under background, the major problems were density, length of cul-de-sac and (p. 286) large holes left from mining the area.

A. Yes, sir.

Q. All right. That was your staff recommendation at that time?

A. On Royal Oaks?

Q. Yes, sir.

A. Yes, sir.

Q. All right. Staff's recommendation there was that they didn't approve the plat because the cul-de-sacs didn't meet the regulation, is that correct?

A. That's correct.

Q. All right. I move that be entered as an exhibit.

I would like to refer you to Defendants' Exhibit No. 19, that's a staff report of the Planning Commission dated June 19th, 1975, is it not?

A. Yes, sir.

Q. Prepared by you, right?

A. Yes, sir.

Q. And with regard to item number two under background, says Squirrel Hill was approved by the Planning Commission December 6th, 1973, subdivision regulation requires that a plat should be (p. 287) reapproved if a year passes and a final plat is not approved. Is that right?

A. Wait a minute. I've lost you there. You are talking about background?

Q. Under background under item number two.

A. Yes, sir. Yes, sir.

Q. All right. About two thirds of the way down on the first page.

A. Yes, sir.

Q. All right. And the staff did not approve the plat because of those reasons?

A. Because there had been no final plat within that year, yes, sir.

Q. All right. Also over on page two of that same report, under item four, in regard to High Gate subdivision, the staff's recommendation there was that Mr. Freeman and his associates knowingly violated the county's road construction requirements and should be held accountable for it, that if the road does not meet county regulations action should be taken to assure that it will. That was your recommendation, wasn't it?

A. Yes, sir. Mr. Freeman had gone out there and put in the road without doing the proper compaction tests and I believe he was asking for it (p. 288) to be oiled and

the position was from Mr. Bowman, as I remember it, that, hey, you need to get the compaction tests right, you know, before you proceed.

Q. All right. Move that be admitted, if the court please.

I refer you to Defendants' Exhibit No. 20, a staff report of the Planning Commission dated October 2nd, 1975. Is that correct?

A. Yes, it's October 2nd, '75.

Q. All right. Over on page two, item five, in regard to Middle Brook subdivision, the staff recommended disapproval of the plan there because several lots had excessive slope and the cul-de-sacs were over 400 feet in length, that is a correct statement?

A. That's a correct statement. Mr. Daniels brought in this and had not located the units on the lot, as I remember, and he brought in a subsequent one, I believe if my memory serves, and had located the units on the lot. I believe the Planning Commission approved it later on.

Q. All right. I move that that would be admitted and I refer you to Defendants' Exhibit No. 21, that's a staff report dated October 16, 1975?

(p. 289) A. Yes, sir.

Q. Prepared by you, right?

A. Yes, sir.

Q. Under the staff recommendations, at the bottom of the first page, High Point Ridge Road, approximately 4,350 feet long, and due to the topography in the area, a portion of the road have grades over ten percent. That

was one of the reasons given for disapproval there, is that right?

A. On release of the maintenance bond?

Q. Pardon?

A. Performance bond, is that correct?

Q. Yes.

A. To be reduced to a maintenance bond?

Q. Right.

A. Yes. That was one of the reasons. The other was that they had stabilization problems on the road. The ditches.

Q. All right. You recommended disapproval for those reasons?

A. Yes. Until they got the stabilization taken care of.

Q. Over at the bottom of page two under item five in regard to Royal Oaks subdivision, staff recommendation number three states you had been (p. 290) given two plats for review, one plat concerns all 91 acres while the second plat only develops the southern portion of the property along the creek. You stated, in my opinion the second plat should not be considered because the land should be evaluated as a whole due to the physical problems with this property. That was your recommendation, wasn't it?

A. I'm not sure where you are reading.

Q. Reading at the bottom of page two, item five. Item five?

A. Which one—one, two or three?

Q. Number three. Number three.

A. Yes, sir. What happened out there, there was a great deal of mining had gone on, phosphate mining, all in that region. And there was also at one time a lake, I believe that was on that particular piece of property that had been dug, and it was in my opinion that, as you know, with phosphate dug soils the soils are very weak and you should have some sort of engineering analysis of the lots, and we asked for, as I remember it, to bring the whole thing in.

Q. Did I read that note number three correctly that you wrote, I have been given two (p. 291) plats for review, one plat concerned all 91 acres while the second plat only develops the southern portion of the property along the creek. In my opinion the second plat should not be considered because the land should be evaluated as a whole due to the physical problems with this property?

A. It's true in terms of the phosphate mining, yes.

Q. All right. I move for admission of that one, Your Honor.

I hand you Defendant's Exhibit No. 24, which is staff report of the Planning Commission dated February, 1976, is that correct?

A. Yes, sir.

Q. All right. Under item one, which is Cotton Wood, correct?

A. Yes, sir.

Q. The staff recommendation there was at the bottom of that page, on reducing the bond, the road and ditches are in no better condition than they were in No-

vember of 1975. The staff recommends that the bond be reduced to 20 percent of the original performance bond and that a maintenance bond be set for five to seven years. The rationale for setting the maintenance bond for five to seven (p. 292) years is based on the fact that it will take that long to develop the entire subdivision. There is no reason why the county should maintain a road while the developer is still building.

Is that your recommendation there?

A. Yes, sir.

Q. All right, sir. I move that that be admitted, if the court please.

If the court please, I'm short one copy on this next one coming up. It's Defendants' Exhibit No. 26, staff report of the Planning Commission dated April 1st, 1976, is that correct?

A. Yes, sir. I'm sorry. Yes.

Q. All right. In item one, in regard to Sun Valley, where they requested renewal of the preliminary plat, the staff recommendation there was to disapprove because certain lot numbers had slopes of 30 percent or greater and is stating, in my opinion, these steep slopes should not be built on. Is that correct?

A. That's correct. This was taken up by the Planning Commission.

Q. And they approved it?

A. They exercised their policy of if one approves a preliminary plat they always worked (p. 293) through it.

Q. Well, they did approve that one, although what you just stated is not in the minutes, or in the staff report?

A. No, it's not.

Q. All right. I move to have that one admitted, if the court please.

I have handed you Defendants' Exhibit No. 27, which is a staff report of the Planning Commission dated May 6, 1976, is that correct?

A. Yes, sir.

Q. I refer you to item number three on page two in regard to Forest Acres subdivision. The staff recommendation by you there was that that be disapproved because the approval of Forest Acres subdivision as planned would create a nineteen hundred feet or foot long cul-de-sac of Forest Trail Drive. Williamson County regulation prohibits cul-de-sac over 400 feet.

Is that your recommendation there?

A. Yes, sir.

Q. All right. I move that that be admitted, if the court please.

I'm handing you Defendants' Exhibit No. 28, which is a staff report of the Planning Commission (p. 294) dated May 20th, 1976, is that correct?

A. Yes, sir.

Q. And I refer you over to item number three on page two. And your staff recommendation there was as follows: The county, in staff's opinion, is clearly within its rights to require developer to rebuild Trace Creek Drive in Harpeth River Estates. Staff's recommendation in light of the fact that the present road is a hot mix road and not oiled and chipped would be to repair all low,

broken and eroded spots, put drainage system in working order and certain other things. Is that correct?

A. Yes, sir. In this particular case the developer had a set of construction plans that required, I don't know how many inches of hot mix, and when we went out there and checked it we found that they did not have the appropriate amount of stone and did not have the appropriate amount of hot mix that they had originally said they were going to put down.

Q. All right. Just a moment, please.

(Pause.)

BY MR. ESTES:

Q. Do you know whether that amount was required at that time?

(p. 295) A. No, sir. This was a decision made by the developer. He decided he wanted to put down hot mix, and as the story unfolded this was part of a Davidson County subdivision, because it's on the county line, I believe this runs for maybe four or 500 feet, this portion of it, and when it came time to check to make sure that everything was in order, we found that they hadn't put down what they said they were going to put down. In other words, two inches of hot mix. They put down less than that.

And the Planning Commission decided, all right, the way we'll solve the problem is we'll have you put an inch-and-a-half of hot asphalt on the road and taper it out.

Q. So here the Planning Commission is requiring the developer to do something that was not required by the subdivision regulations and so forth but was something

the developer had voluntarily agreed to do but had failed to do, is that correct?

A. Why not? The developer chose to put down two inches of hot mix. I'm assuming he brought his plans in. As I remember, I saw the plans, and he said I'm going to put down two inches of hot mix instead of putting down oil and chip. The Planning (p. 296) Commission said, okay, you can put down the two inches of hot mix.

When Mr. Bowman went out and reviewed the subdivision, they had not placed two inches of hot mix, they had placed approximately an inch-and-a-half. So at that point they had not met the requirements that they put down for themselves. And they wanted the two inches.

We went back to the Planning Commission, said, hey, we don't exactly have two inches. They talked with the developer, he agreed to come out— or I assume he agreed—no, he said that they wanted him to put down another inch-and-a-half in the center and taper it out. And that would be the end of the discussion.

Q. All right, sir. I have handed you Defendants' Exhibit No. 33, which is a staff report dated October 21, 1976, is that correct?

A. Yes, sir.

Q. All right. I refer you to item number one in regard to Countrywood.

A. Yes, sir.

Q. Let me refer you on over. I think that's what you had testified to earlier. I had that underlined and that's a mistake on my part.

(p. 297) A. No, sir, I didn't testify to item one.

Q. You didn't?

A. No, sir.

Q. Anyway, that's a mistake. Let me refer you over to item four on page two in regard to High Gate. The developer where he requested a revised preliminary approval of Section Three and the staff recommendation was disapproval on the grounds that the slope on lots ten, eleven and twelve are too excess for building, and lots seven, eight and nine only be 125 feet at the building line, and the slope on Windsor Way exceeds to allow the ten percent without a variance being granted by the Planning Commission. That is your recommendation there?

A. Yes, sir. In the case of number two, the zoning ordinance requires in that zone that the lot be 125 feet wide.

Q. All right.

A. In the case of the slope, as I remember, on ten, eleven and twelve besides the fact that they had slope problem and had not located a building site, there was also some mining had gone on in there and I pointed out to the Planning Commission that as the plans we saw for Windsor Way, (p. 298) they did exceed the allowable ten percent without the Planning Commission granting a variance. Yes, sir.

Q. All right. That's a slope of a roadway, right?

A. Yes, sir. I'm saying here that if the Planning Commission doesn't want to grant a variance, then it should be disapproved.

Q. All right, sir.

A. Just pointing out to them that that's what was there.

Q. All right, sir.

Your Honor, I think I neglected to move that some of these be admitted. I want all of them admitted so far to this point.

THE COURT: All right.

BY MR. ESTES:

Q. All right.

A. This is November 18, 1976.

Q. That's a staff report dated November 18, 1976, the Planning Commisison, right?

A. Yes.

Q. I refer you over to page two, item five, in regard to High Gate again. Your staff recommendation again there was to disapprove on the (p. 299) basis that Windsor Way was over 500 feet in length, is that correct?

A. As I said before, sir, the zoning regulation states without a variance. Shouldn't be over 400 feet. I'm saying here a variance would have to be granted to go over 400.

Q. All right. There is a 500 foot cul-de-sac, right?

A. Yes, sir.

Q. You recommended disapproval unless a variance were granted, right?

A. Yes, sir. Yes, sir.

Q. All right. I would like to have that one admitted, Your Honor.

I'm handing you Defendants' Exhibit No. 35, which is a staff report of the Planning Commission dated January 20th, 1977. Is that correct?

A. Yes, sir.

Q. I refer you over to item two on page two in regard to Spencer Creek Place. Again, a cul-de-sac, fourteen hundred feet in length, and you recommended disapproval for that reason, did you not?

A. Well, no, sir. It wasn't that simple. The subdivision had originally been owned by one (p. 300) man, it was foreclosed. They had run a road that was approximately 2,000 feet long in a loop that connected to Spencer Creek. They came back in and then instead of having it where it went all the way around like this, and cut it back to fourteen hundred feet, that was the circumstances. Again, it was one of these situations where the Planning Commission would have to grant a variance, and they did.

Q. All right, sir. Also in item four in regard to High Gate, you recommended disapproval because Windsor Way is over 500 feet in length, that's what it states there, is that not true?

A. Yes, sir. Or they would have to grant a variance.

Q. The next page, another reason for that disapproval was the slope of Windsor Way was in excess of the maximum slope allowed by the Williamson County subdivision regulation, is that true?

A. Well, we said that they had a steep slope. That's what the statement was.

Q. All right. All right. I refer you on down to item number five there on that same page. It states the cuts

that will be necessary to put in (p. 301) the roads and ditches will be approximately ten feet. These cuts present a major problem relating to stabilization because of excessive slope and soils condition. That is true?

A. Now wait. I'm not with you now.

Q. Note number five or reason number five, under your staff recommendation there. Under item four. We are still under the same item?

A. Uh-huh.

Q. I'm down to paragraph numbered five. Starts out with the word cuts?

A. Yes, sir, I see it.

A. All right.

A. Now we're talking about ditches now?

Q. Well, I believe it says the cuts in the hills, that's what it means, doesn't it?

A. Yes. This subdivision was ditched.

Q. Well, did I read it correctly or not? The cuts that will be necessary to put in the roads and ditches will be approximately ten feet. These cuts present a major problem relating to stabilization because of excessive slope and soils conditions.

A. That's correct.

Q. If approved as designed, right?

A. That's correct. That's correct. Because (p. 302) the ditch would be a V ditch. And they would have to start—

MR. NEBEL: He didn't read the parenthetical.

BY MR. ESTES:

Q. There is a parenthetical statement there. Let's see what it says. (Top soil is cherty, which tends to slip and slide.) If approved as designed, sodding and concrete ditching will be imperative. Isn't that your recommendation?

A. Yes, sir. On the ditches.

Q. Move that that be admitted, Your Honor.

I refer you to Defendants' Exhibit No. 37, staff report of Williamson County Planning Commission dated April 7, 1977, is that correct?

A. Yes, sir.

Q. All right. I refer you over to item number ten, which is Ranch View.

A. Yes, sir.

Q. I'm sorry, yes, okay. Item ten.

A. Yes, sir. Uh-huh.

Q. Your staff recommendation there was disapproval because lots nine through 15 and 25 through 45 have steep slopes ranging from 20 to 50 percent, is that correct? (p. 303) A. That's correct. There have been no site work done at all on it.

Q. All right. Item number 11, right below that, on Sun Valley, here is where Sun Valley had received initial preliminary approval on June 7th, 1977, the plat was re-submitted April 1st, 1976, for preliminary renewal. And at that time the staff recommended that the preliminary

not be renewed because lots 17, 18, 19, 20, 29 and 31 had slopes of 30 percent and greater. Is that your staff report there?

A. That's only part of it.

Q. All right. That's part of it. Your staff recommendation was to disapprove. Part of the reason for disapproval was number two there, lots 17, 18, 19, 29, 30 and 31 have excessive slopes, isn't that true?

A. That's part of it. The Section Four where you go down and talk about how the plats don't match the final plat, was also a very important part in the Planning Commission and my review of the thing.

Q. All right.

A. They subdivided one into the other.

Q. All right. All right. Move to have that (p. 304) one admitted, Your Honor.

I hand you Defendants' Exhibit No. 39.

A. June 2, '77?

Q. Yes. June 2, '77. Staff report of the Planning Commission. I refer you to item 11 where you were dealing with High Gate subdivision and you recommended disapproval because of slope of Windsor Way was in excess of maximum slope allowed by the subdivision regulations, that is correct?

A. And I went on to say that if the plat is to be approved as is, a variance on slope would be necessary.

Q. Right. Okay. Move to have that one admitted, too.

I have handed you Defendant's Exhibit No. 40, staff report dated January 16, 1977, Planning Commission, is that correct?

A. Yes, sir.

Q. I am referring you over to item four, the next page after item four begins.

A. Sir? I missed you.

Q. Move on over to the next page where item four begins.

A. Okay. All right.

Q. All right. I refer you to note or (p.305) paragraph numbered six, down there, that states preliminary approval of Section Four in no way should be interpreted to mean that the remainder of the property northwest of Windsor Way is approved. Is that your recommendation there?

A. As I remember on this, this is a new plat that they brought in. And that is correct. It's the new preliminary that they brought in. It was not the original.

Q. All right. I move to have that one admitted, if the court please.

I have handed you Defendants' Exhibit No. 42, which is staff report of the Planning Commission dated August 18, 1977, is that correct?

A. Yes, sir.

Q. I refer you over to item seven in regard to Harpeth Green subdivision where the staff recommendation by you was disapprove underground, one, that the development is one large cul-de-sac of approximately seventy-eight hundred feet. Was that your recommendation there?

A. Yes, sir.

Q. All right. Move to have that one admitted.

And I hand you Defendants' Exhibit No. 44, which is staff report of the Planning Commission (p.306) dated October 6, 1977, is that correct?

A. Yes, sir.

Q. And I refer you to item number nine under — well, item nine on page three in regard to Battle Wood Forest.

A. Yes, sir.

Q. I believe you recommended disapproval there because lots one through six were located on steep slopes and should not be built on until detailed engineering analysis of the said — I assume that means the said lots — have been completed to determine the safe slopes, is that correct?

A. That's correct.

Q. I move to have that one admitted.

Q. All right. I handed you Defendants' Exhibit No. 46, which is a staff report of Planning Commission dated November 3rd, 1977, is that correct?

A. Yes, sir.

Q. That's one you prepared too, isn't it?

A. Yes, sir.

Q. And I refer you over to page two under item one in regard to Oakwood Estates. Do you see that?

(p.307) A. Yes, sir.

Q. The staff recommendation there was in paragraph numbered one, I refer you down to about the middle of that paragraph where the sentence begins, staff recommends that the excessive set back not be approved regardless of whether or not the preliminary plat showed them. The preliminary plat is just that, preliminary, and only provides the staff with an initial guide while the final plat must conform to subdivision and zoning regulations.

Now is that what you wrote and what you recommended?

A. Yes, sir. That's correct.

Q. All right. Move to have that one admitted.

I have handed you Defendant's Exhibit No. 47, which is a staff report of the Planning Commission dated December the 1st, 1977, is that correct?

A. Yes, sir.

Q. And that's your staff report, isn't it?

A. Yes, sir.

Q. I refer you over to item number four in regard to Inavale Estates, where you recommended disapproval, did you not, for among other reasons, (p. 308) under numbers four, five, six and seven that the road grade and the lot grades in several areas will be at 20 percent and greater, Inavale Drive creates a cul-de-sac of approximately 4,000 feet if it is never extended, Creekside Drive creates a cul-de-sac of 600 feet in length and all lots must meet the minimum zoning request both on preliminary and final plats. Is that your recommendation?

A. Yes, sir.

Q. All right. Move to have that one admitted.

I have handed you Defendants' Exhibit No. 48, which is a staff report of the Planning Commission dated January 6, 1978, is that correct?

A. Yes, sir.

Q. I refer you over to item seven where you recommended disapproval, did you not, for among other reasons, under numbers three and four, lot grades and road grades to be 20 percent or greater and Inavale Drive creates a cul-de-sac of approximately 4,000 feet if extended. Is that correct?

A. Correct.

Q. I move that one be admitted.

I hand you Defendants' Exhibit No. 49, which is a staff report dated January the 24th, (p. 309) 1978, Planning Commission, is that correct?

A. Yes, sir.

Q. Did you prepare this one?

A. Yes, sir.

Q. All right. Were the staff reports and those things attached to them generally things that you worked up while you were a planner there for the commission?

A. Yes. There were some exceptions where I would be working with the county engineer on certain matters.

Q. All right. Who was the county engineer on January the 24th, 1977?

A. Tim Lewis.

Q. Tim who?

A. Tim Lewis.

Q. Tim Lewis. All right. Did Tim ever make recommendation of things that you disagreed with?

A. I don't remember. I don't remember.

Q. All right, sir. Did you prepare the documents that are attached to that staff report?

A. Yes, sir.

Q. All right. One of those documents is entitled disadvantages of uncontrolled development, is it not?

(p. 310) A. Yes, sir.

Q. It states under there the inability to have the county to provide adequate services to match the development, that's number one; number two, soaring tax rates due to inefficient provisions for sub services. Number three, poor quality of services. Number four, land speculation and destruction of the natural landscape. And number five, inability to implement the planning process. Is that a correct reading of that?

A. Those are standard — standard in planning, yes.

Q. All right. Under the title disadvantages of sprawl, it lists four reasons, or four disadvantages: One, capital cost of the county; two, long term operating and maintenance costs; three, environmental costs; and four, personal costs such as land prices, time spent in travel between home and work, accidents and psychological. That is a correct reading?

A. Yes, sir.

Q. All right. It goes on to list basic steps for land growth and then on the next page, goals, is that correct?

A. Yes, sir. It goes into the same detail on

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*Testimony of Robert Moran
Direct Examination by Nebel*

(p. 321) Planning Commission from 1964 through 1978 and you were chairman at the time that the original preliminary plat of Temple Hills was approved, is that right?

A. That's right, yes.

Q. Do you recall that preliminary plat when it was first approved and the circumstances that surrounded it?

A. Yes, sir. Mr. Brown, I think, was representing the company at that time and they brought it in, it was a cluster. They approached us about a cluster subdivision, something we never had before.

Q. All right.

A. And it was a new concept, we didn't have anything to cover it at that time. So we did a whole lot of study on it and a whole lot of talking and thinking before we ever proceeded with it.

Q. All right. That was back in around 1972?

A. Yes, sir, somewhere. I can't remember exact year but that's approximately right. Yes.

Q. All right. Now Mr. Brown you referred to is Mr. Lytle Brown?

A. Yes, Lytle Brown. He represented the people that wanted to put it up.

(p. 322) Q. Now what was that property formerly?

A. It was formerly known as a farm, yes. Mr. Billy Temple's farm, and been in the family, oh, I reckon a hundred years or better.

Q. All right. You used to live pretty close to the Billy Temple farm?

A. Yes. My father and his brothers and sister were born and raised next right to it. I have known it all my life very well.

Q. You have been a farmer all your life?

A. Yes.

Q. Was the Temple farm much of a farm?

A. No, sir, it wasn't much of a farm. Not for agricultural. The land was thin and it was mostly wooded lands. It had some fair land on it but it was just fair.

Q. All right. Now if you will, please, sir, tell me the best you recall who the people were who came to the Planning Commission and wanted to get that property rezoned?

A. That was Mr. Jim Patterson and his associates.

Q. All right. He had several partners at the time?

A. Yes, sir. Yes, sir.

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 324) you indicated there wasn't any zone that could handle what they wanted to do out there?

A. That's right.

Q. On this piece of property. What did you mean by that?

A. Well, there wasn't anything that we could consider in what they wanted for town houses or cluster zoning. Such as putting—having open spaces and putting houses closer together. I think half acre zoning, half acre subdivisions unless otherwise required by the man that had the subdivision was what the county required, was half acre lots. We later went to 40,000 square feet, but at that time you could build on a half acre.

Q. All right.

A. So the cluster concept was something new. We didn't know anything about it, we never heard of one. And Mr. Patterson and his group chartered a Greyhound bus and invited everybody on the county commission, everybody on the Planning Commission and anybody else that was interested, to go to Louisville, Kentucky and look at one. That was the closest one.

Q. You mean look at a subdivision like that?

A. Yes. What you call a cluster subdivision, (p. 325) you could have acre lots, half acre lots, quarter acre lots, houses touching one another. It's just a new concept. It was supposed to blend in with the environment that you put it on. You could have steep hillsides or whatever. I mean they allowed almost everything, but it had to blend in together, it had to look right, it had to look right too, it had to be compatible with whatever was around it.

Q. Compatible with the topography or the lay of the lands?

A. The topography and also had to blend in. If you was changing from town houses to half acre lots, that had to blend in right. It was a new concept.

Q. All right.

A. We went to Louisville, Kentucky and looked at one and I was very much impressed as was everybody else that went.

Q. You were chairman of the Planning Commission during this trip?

A. I was, yes, sir.

Q. All right. Now what did you do when you came back concerning approval of a new cluster zoning?

A. Well, first thing we had to do was get to

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(p. 327) aspects of it, but I never knew of anybody around there that had just a whole lot to say against it, no, sir, not to my memory.

Q. You had a lot of interest in it?

A. Had a lot of interest in it. Something new. A lot of people were interested in it.

Q. Do you recall the developer working with the people and trying to satisfy any questions they may have had about the development?

A. Yes, sir. He certainly did. Looked like he went out of his way to make it suitable to everybody around.

Like I said, I got first cousins that own property right next to it and they didn't object to it. They live right over the fence from it.

Q. All right. Now I'm just going to skip ahead for a minute to 1978 when you, I believe, testified a moment ago when I read your qualifications you were on the Planning Commission from '64 through '78?

A. Yes, sir, you see, I was—the subdivision—I mean the Planning Commission requires that a member of the Quarterly Court be on the board. I was the representative from the Quarterly County Court. It's a commission now. (p. 328) But it was a Quarterly County Court then and I was the representative on the Planning Commission.

Q. All right. What happened in 1978 that you were no longer on the Planning Commission?

A. Well, I wasn't reappointed. See, when I had to run for reelection that year as commissioner, I was re-elected, but I wasn't reappointed on the Planning Commission.

Q. All right.

A. You had to be reappointed when your time run out.

Q. Who had the appointive power?

A. Judge Kelly.

Q. Did he tell you why he was not going to reappoint you?

A. Well, we talked about it and he told me that he would prefer to have somebody. We had had some differences of opinion. He said he would prefer to have people

on the Planning Commission that was more compatible with his views. And I told him I would be glad to go along when I saw it his way, if I didn't, I wouldn't. So he just wouldn't reappoint. We didn't argue. I just wasn't reappointed.

Q. All right. Did he ever tell you that he (p. 329) thought you voted for too many developments?

MR. ESTES: Objection, this is not set forth in the pleadings.

MR. NEBEL: I believe I'm allowed to lead to refresh his recollection. I asked him about conversations he had with Kelly. I'm trying to refresh his recollection as to that specific conversation he had with Judge Kelly at that time when he failed to reappoint him.

THE COURT: All right. Why don't you identify, lay a little better foundation for your question?

MR. NEBEL: All right.

BY MR. NEBEL:

Q. Other than what you already told us what Judge Kelly said, he didn't reappoint you, was there anything else he said at that time?

A. Well, yes, sir. He did—at one time told me he thought I would vote for anything.

Q. What do you mean?

A. Well, I'll admit I was favorable, I was favorable towards—more favorable towards developers than he was. And consequently voted more favorably than he did. I think that's what he was referring to.

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Testimony of Robert Moran

Direct Examination by Nebel

(p. 341) every acre in the county gobbled up, people sitting on an acre of land when they don't need a third of an acre. I thought since they had sewage and things worked out, I thought it was an excellent idea. I still do. I think an acre lot is the foolishhest thing you can have.

Q. Was there any discussion about how this open space is going to be used in Temple Hills?

A. Well, it was to be used for the recreation and playground for the children of the people that lived in it.

Q. All right.

A. That was up to them. We didn't set down what they had to have. They did say right off they was going to have a golf course. That was the first thing they built.

Q. Was the Planning Commission aware when they approved that preliminary plat that there was going to be a golf course there?

A. Well, that was what they built the whole thing around. Yes, we were well aware of that.

Q. Did the Planning Commission, when they adopted this, adopt the open space or at the same time draw up an open space easement that incorporated the open space, the gold (sic) course as

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(p. 345) Commission considered and it's a foundation for their policy that Mr. Moran is going to testify to concerning later on.

THE COURT: All right. Who made the statement?

Mr. Nebel: Mr. Lytle Brown, who was making a presentation at the Planning Commission.

THE COURT: All right. I will let you ask him that question what was said about the money, and I'll instruct the jury that that is not admitted into evidence as proof that that must would be involved, only that that statement was made during the presentation to the Planning Commission.

BY MR. NEBEL:

Q. All right. What did Mr. Brown tell members of the Planning Commission about the development costs of the golf course?

A. Well, I don't remember. I don't remember the specific amount, but it was a very large amount because the golf course was the first thing they was going to build and was the first thing he built and I don't know how much it cost, but we knew it was a substantial amount of money just drawing up preliminary plats, anything connected

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(p. 364) whatever subdivision was operating, operated on whatever was approved when this was approved, not what you did later.

Q. All right.

A. In other words, you couldn't change the rules in the middle of the game.

Q. All right.

A. Not the road. We changed the roads' specifications quite often.

Q. All right. I'll hand you what has already been admitted into evidence as Plaintiff's Exhibit No. 1057. I will ask you if you can identify that document?

A. Yes, sir. This is minutes of May the 4th, 1978.

Q. All right, sir. If you take a look at item number six, Roman numeral six down here, what did the Planning Commission consider at that time?

A. Well, item six, Stanford and Associates requested final approval of Section Four on Temple Hills Country Club Estates, located in the 6th Civil District of Williamson County off Temple Road.

Q. All right. Was there a motion made to approve that?

* * *

Testimony of Robert Moran
Direct Examination by Nebel

(p. 370) Q. And the Planning Commission intended not to delete any building lots for ten percent for roads?

A. That's right. The lot numbers were computed on the total acreage.

Q. All right. I believe that may be all, Your Honor, if I might have a minute or two.

(Pause.)

BY MR. NEBEL:

Q. What does upgrading standards mean to you?

A. Upgrading standards, we did that from time to time. That means improving the regulations. If you can improve them without—in other words, just like going from oil and chip to hot mix could be an improvement. But you had to bear in mind that when you upgrade the regulations, that the ones that you had already—the subdivision that you had already issued preliminary plats on didn't necessarily have to come under the upgrading rules.

Q. All right. For example, Temple Hills to upgrade the hot mix?

A. If you do that, why, whatever we approved when we approved the preliminary plat, that's what they had to do. That's all they were bound by.

Q. All right, sir.

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*Testimony of Robert Moran
Cross-Exam by Estes*

(p. 378) membership, that there would also be considerable other open and green spaces sanitary sewers would be furnished, the same to be serviced by the Harpeth Valley Utilities District.

Q. All right. Sir, my question is it was obviously contemplated in the beginning that there would also be considerable open and green spaces in the golf course?

A. That's true.

Q. All right. To your knowledge, has there ever been any open space dedicated out at Temple Hills in addition to the golf course?

A. I couldn't say. I don't know. I know the golf course was—see, like I said, that thing was frozen there for a while, then I went off. I hadn't been there in four years. So I don't know what they have done really.

Q. All right. Could the witness be passed number 1009, please?

THE COURT: Why don't we break for the day and then maybe you could get these exhibits in order so we can do that?

MR. ESTES: I'm sorry. I didn't realize (sic) they were being passed someplace else.

THE COURT: I didn't say that to be

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*Testimony of Robert Moran
Cross-Exam by Estes*

(p. 398) A. Yes.

Q. Mr. Green stated that it was his belief that requiring a developer to go before the County Court would be a deterrent to such developments in Williamson County and he further stated it was his belief that such a zoning ordinance would be a way to insure the preservation of flood plain and steep hillsides, isn't that what the minutes reflect?

A. Yes, sir.

Q. All right. I move to have that exhibit entered, if the court please.

I'm handing you what's been marked as Defendants' Exhibit 064, which is the minutes of the Planning Commission dated October—November 2nd, 1977?

A. Yes, sir.

Q. I refer you over on the second page, the first paragraph that begins on that page where the minutes reflect that the chairman announced that the County Court by margin of only one vote had disapproved resolution respecting cluster zoning, which had been recommended by the Planning Commission. And that although the matter had not been put on the agenda for the meeting he thought it ought to be considered further. And if possible (p. 399) an agreement in principle be reached that might be suitable to the commission and might be passed by the county—by the Quarterly County Court at its next meeting. Mr. Tyler Berry was present representing Mr. Billy Temple, on whose property the construction of this cluster zoning project had been proposed, Mr. Berry expressed the hope that some agreement be worked out whereby a cluster zoning project might be authorized. That Mr. Robert Ring appeared and joined in the discussion and it appeared particularly from statements of Mr. Ring that the objections raised by one or more members of the County Court for the resolution as submitted were as follows: The first one being that land in a subdivision in a flood plain or on a steep hillside should be excluded in determining the acreage for the size of the subdivision for density purposes. That for example the subdivision embracing a hundred acres on which 50 acres were in a flood plain should be allowed only 50 units, where the zoning requirements called for a minimum lot size of one acre. Isn't that what the minutes reflect?

A. Yes, sir.

Q. Further reflect that in all cluster

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Testimony of Robert Moran
Cross-Exam by Estes

(p. 401) the Court probably would pass the resolution if it contained that provision along with a reasonable compromise on the flood plains and the steep hillsides issue. And that thereafter Mr. Sanders moved that the resolution as previously submitted by the commission to the County Court be changed in two respects. And that as changed the resolution be again submitted with the recommendations from the commission that it be adopted. And the changes were to provide—that's on the next page—that in computing the size, (acreage), of a subdivision for density purposes only 50 percent of areas within a flood plain and only 50 percent of areas lying on a slope with a grade in excess of 25 percent shall be included. Further, the second one, that no more than five dwelling units be permitted on any one acre of land. This motion was seconded by Mr. Collier and passed by unanimous vote.

Is that what the minutes state occurred on that occasion?

A. Yes.

Q. You were present at that time?

A. Yes, sir.

Q. Chairman of the commission?

A. Yes, sir.

* * *

Testimony of Robert Moran
Redirect Examination by Nebel

(p. 451) that may have been in excess of 25 percent in Section One where final plat was approved?

A. Well, I'm sure I was, yes, sir. I think so.

Q. All right. Was the Planning Commission's policy to allow building where there was a buildable site?

A. That's right.

Q. You testified about your trip to Louisville and how you went up there and saw some houses?

A. That's where I was favorably impressed with such as that.

Q. All right.

A. I tell you why I was. Can I do that, Mr. Nebel?

Q. Yes, sir.

A. You know, I'm a farmer and we are losing land at a rapid rate, good land, you know developers like the good land just like I do. Nobody likes a rocky hillside. Anything that I can do to help to put houses—people are going to come anyway, people has got to live somewhere, you got to prepare for them, no need fighting against it, if they prefer—some people prefer to live in

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Testimony of Philip M. Maples
Direct Examination by Nebel

(p. 566) to paragraph 2.2 and tell me if you recognize that type of provision.

A. Yes. Uh-huh.

Q. All right. Do you recognize that provision or where have you seen that provision before?

A. This is a provision that we typically put in any subdivision regulations that we develop. It's in the APA, American Planning Association model, subdivision regulations.

Q. All right. Now what is the title of that provision?

A. It's called safety provisions here.

Q. All right. Now what's the purpose of the provision like that?

MR. ESTES: If the court please, if he is asking for an interpretation of it I will object. I may be premature, but I want to make it in plenty of time. I don't think this man is the proper witness to make a so called legal interpretation of that safety provision. That's where he is going, I'm objecting.

MR. NEBEL: I'm not asking him to make a legal interpretation. I'm asking him to do the same thing that Tom Ragsdale did yesterday, (p. 567) that is as a planner, he said he just came from the model code for planners, not a legislative act but a code for planners, the APA model code, and just simply state what the purpose of that provision is.

THE COURT: From the planner's point of view?

MR. NEBEL: Yes, Your Honor.

BY MR. NEBEL:

Q. In a planner's point of view, please state the purpose of that provision.

A. Well, that provision is put in there to protect developments that you have already on going or already approved under previous regulations. For example, many developments that you have approved under a preliminary could take a number of years to develop or build down. And so, therefore, if someone, if a community decides to change, upgrade, modify the regulations, that would somehow have an impact on the previously approved development, then you need to have this savings provision in here to protect developments that have been previously approved under your previous regulations.

Q. All right. Now as a planner, let's take the Temple Hills subdivision for a moment. First (p. 568) of all, you said that subdivisions often times take years to develop.

A. Uh-huh.

Q. Are you familiar with the size, the approximate size of the Temple Hills subdivision?

A. Approximately. I know it's several, 600, 700 acres, 800 acres.

Q. All right. In your experience as a planner, how long would it normally take, what would be an average time to develop a subdivision like that?

A. That's difficult to say. Usually a number of years.

Q. Would it be unusual for it to last as long as 15, 20 years?

A. It's very possible. Especially in today's economy.

Q. All right. Now if you would, please, take that provision, 2.2, as a planner, and apply it to the Temple Hills subdivision.

MR. ESTES: If the Court please, I object to that. I think he's asking him to apply that and say whether or not that would apply to Temple Hills without bringing in all of the attendant circumstances, that this man has not even (p. 569) made me aware or the Court aware that he is aware of. I don't think he is. I think without all that foundation, knowing exactly which plats were platted where, how many lots—am I making a speech I shouldn't be making in front of the jury? Should we argue this out of the jury's hearing?

MR. NEBEL: All I simply want him to do is say what the Williamson—I'm just asking him as a planner, if faced with Temple Hills and upgrading regulations what would he do under that provision.

MR. ESTES: That's objectionable, what that man would do has no relevance.

MR. NEBEL: It is because he is an expert. He is a master planner. He gets to testify what good planning practice is.

THE COURT: I think the objection is a sound one in terms of what he would do. What he thinks the sound planning resolution of that would be, I think it permissible.

MR. NEBEL: That's what I'm after. I'll rephrase my question.

THE COURT: All right.

BY MR. NEBEL:

Q. Mr. Maples, as a planner—

(p. 570) THE COURT: Wait. You state your question and I'll ask the witness to wait before he answers so that we can have the objection.

BY MR. NEBEL:

Q. All right. As a planner, if you were presented a plat like the Temple Hills subdivision, and let's assume that the development started in 1973, and you are faced with subdivision regulations that are being adopted and amended in 1980, please tell me the relationship of the 1980 subdivision regulations and the impact of 2.2 goes, provision 2.2, that it would have on application of those upgraded regulations to the Temple Hills plat?

MR. ESTES: If the court please, I object to that. If he has not put in all of the attendant circumstances, what plats have been platted, what lots have been drawn, what's been taken, the final plats and recorded, and so forth. I think all of these are very, very germane to this question. And obviously the man has not been apprised of all of that.

THE COURT: Just find out if he does know what the status of it was at that time. If he does know what plats had been—

MR. NEBEL: I'll be happy to do that. (p. 571) I don't think the admissibility depends upon that though, because I think he's entitled to—

THE COURT: Let's see if he is familiar with what the status was at that time.

BY MR. NEBEL:

Q. All right. Are you familiar with what final plats had been approved in Temple Hills?

A. Now? Presently?

Q. Yes.

A. Well, see, up to—I haven't had any involvement with Williamson County since June of 1978. Prior to that time, of course, I was aware of the Temple Hills development. Specifically giving you specific dates right at this moment, when each preliminary, when each final, when each section was filed, I can't do that now.

THE COURT: In 1978 was he familiar with the stages of development of the Temple Hills project.

BY MR. NEBEL:

Q. All right. Did you hear the judge's question?

A. I was familiar with Temple Hills and the stages of development up to 1978. Yes, sir.

THE COURT: All right.

(p. 572) BY MR. NEBEL:

Q. Now as of 1978, if the regulation before you had been adopted in 1978, with the same provision, what impact would the savings provision have on the application of those new regulations to the Temple Hills plat?

MR. ESTES: Your Honor, my objection still goes to whether or not preliminary plats had all the lots that they are now seeking to get approved on, and when final plats have been approved and how many lots they had on them and so forth.

THE COURT: Okay. I'll overrule your objection to it.

BY MR. NEBEL:

Q. Mr. Maples, did you understand the question?

A. Would you repeat it?

Q. If I can.

A. If you can.

Q. All right. In 1978 when you were familiar with the development of Temple Hills, if assuming the regulations you had before you were adopted in 1978, and taking the Temple Hills plat in the stage that you knew it in 1978, please tell me what (p. 573) impact Section 2, savings provision, would have on the application of those new regulations to Temple Hills.

A. The savings provision, what it says, and it should have provided for the development to continue to be developed according to the '73 regulations. I say that because development at this time had the infant structure, I mean water and sewer systems, streets and so forth, planned and built, they go in usually first, based upon the size of the development that was approved in 1973. So this savings provision is put in the regulations when they are upgraded or modified or changed to protect previous development and particularly previous developments that are being built automatic over a long period of time. And so that's simply—have I answered your question?

Q. Yes, you have.

A. All right.

Q. Now my last area of questioning for you. You supervised Tom Ragsdale?

A. I did.

Q. All right. Now if you would, please, evaluate Tom Ragsdale's performance as a planner.

A. Tom is an excellent planner. Based on his

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Testimony of Thomas Vance Little
Cross-exam by Estes

(p. 602) especially so that individual lot owners would—yes.

Q. Isn't that what that reflects?

A. That the homeowners would share ownership and rights to use open spaces.

Q. All right, sir. Now let me refer you to Defendants' Exhibit No. 63, the minutes of the meeting of October 5th, 1972.

A. Okay.

Q. Refer you over to page two, the last sentence, does it not indicate that the zoning ordinance would be a way to insure the preservation of flood plain and steep hill-sides?

A. Yes. That is Mr. Green, referring to who made that statement.

Q. All right. Mr. Green was representing who there?

A. Mr. Green was on the Planning Commission I believe.

Q. Mr. Green?

A. Curtis Green.

Q. Curtis Green, okay.

Now you have made a reference to the '73 zoning ordinance that was passed.

A. Uh-huh.

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Testimony of Thomas Vance Little
Cross-exam by Estes

(p. 604) A. Right.

Q. In figuring density or greatest number of lots that could be used?

A. Right.

Q. Now I want to call your attention to the map on the board up here.

May I approach it, Your Honor?

THE COURT: Fine.

BY MR. ESTES:

Q. I call it a map, it's actually I think a plat.

It's Plaintiff's Exhibit No. 9700. And I believe your attention was called to this early on direct, is that right? Or was it?

A. I don't know. Right.

Q. If you would, step over here and assuming that this is a reproduction of the original preliminary plat, after it was revised several times, you were asked about—I remember now you were asked about a letter that you signed that said something about allowable dwelling units in the whole development appeared a figure of 736.

Q. All right. Also that plat provides actual dwelling units presented in initial sketch plan of 469, doesn't it?

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Testimony of Leon Stanford
Cross-exam by Estes

(p. 650) would be that the developer wanted to go ahead and develop into these areas that he would have to draw in the lots, design what he wanted to build there and then submit that to the Planning Commission for approval? Is that correct?

A. In order to get final approval, that's what we were talking about. Final approval.

Q. Yes.

A. It would be the same procedure that he followed on Section Two. That he followed on the additional lots done along Sneed Road there. When the time came to—when he wanted to develop those, simply drew up a final plat along with the construction drawings, presented it to—the final plat to the Planning Commission for approval, recorded it and started building.

Q. He would have no right to sell any lots in that area out there or develop any lots in that area unless and until he drew up that final plat showing the design of those lots and submitted it to the Planning Commission for approval, is that not correct?

A. That would be correct for any lot in the entire subdivision.

Q. All right.

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Testimony of Leon Stanford
Cross-exam by Estes

(p. 656) it would be easier to answer your questions.

Q. I'm trying to determine whether or not you agree that in determining the area that has to be removed, that 50 percent of slope area in excess of 25 percent, in determining that area to be removed from a subdivision before you can figure the maximum number of lots, do you consider it a proper method to take a contour map or topographical map with contour lines on it and look at those contours and determine what the distance is between the two contours and then thereby determine the slope?

A. I told Mr. Sweeney in my deposition that that's exactly how you determine slope between two contour lines.

Q. All right.

A. Not the area of the subdivision, but the slope between any two contour lines would be done that way.

Q. All right, sir. And also that if you merely went from the topmost part of the hill down to the bottommost part of the hill you would get an average slope method, wouldn't you, rather than true slope? Isn't that true?

A. That's true. The only way you can get a true slope is to measure between two designated (p. 657) points that have this same amount of slope. If the slope changes and you go beyond that, then you don't determine the slope of that area.

Q. All right.

A. Does that make sense to you?

Q. Yes, sir. Perfectly good sense to me.

A. If you are just determining the slope between two contour lines and you select two contour lines, then you realize that the differential between those two is the accuracy of that map itself. In other words, the two foot contour for one foot or five foot.

Q. All right. And to determine the area, an area that has slope in excess of, say 25 percent, going from the top of the hill to the bottom of the hill, doesn't have anything to do with it, does it?

A. You know, if I answer that question exactly that way, I think—I don't want to be misleading but I want to be sure.

Q. I don't want to misstate you. In fact, I'll let you read the question and the answer if you would like.

A. I don't need to. I know what you are saying, and it's the same discussion that Mr. Sweeney and I had.

(p. 658) If you want to determine the slope in any particular point, you measure the difference in elevation and distance between the two. If you go over a point where the grade changes, in other words, if you go down a hillside and the slope changes, then you measure from one point to another to where a grade change is made, you don't get a correct slope.

Q. You just get an average slope, don't you?

A. You get an average. If I were looking for the 25 percent slope in trying to remove 50 percent of that from a total area, I would take the entire map and look at areas that exceeded that grade, okay?

Q. Yes.

A. That would be from the top of the hill to the bottom of the hill. But I would only take that area that exceeded that slope and determine that, then take that part out. That doesn't have any more to do with that lot, no more take out a lot because of that than you would take out the whole property because of that. You only remove that part that exceeds that grade and only that part.

Q. Thank you. Is it true that you have absolutely no firsthand knowledge of any meetings

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*Testimony of Joseph Hunt
Direct Examination by John Bailey*

(p. 671) THE COURT: You may step down.

MR. BAILEY: We call Joe Hunt, if Your Honor please. He's right outside.

JOSEPH HUNT

was called as a witness on behalf of the plaintiff and, having been previously sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. BAILEY:

Q. If Your Honor please, this is Mr. Joseph Hunt. A summary of his qualifications and his testimony has been previously filed in accordance with the rules of this court. I will summarize his qualifications and then read the sum-

mary of his testimony preliminary to asking him a few questions concerning that.

Mr. Hunt is 43 years of age, he lives here in Nashville, Tennessee. He has attended numerous appraisal schools, including I take it various real estate and appraisal courses. He has completed the American Institute of Real Estate Appraiser courses, Appraisal One and Two, Industrial Appraisal, and the Instructor's Workshop. He has also attended U. T.

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*Testimony of Joseph Hunt
Direct Examination by John Bailey*

(p. 680) capital adjusted upward from 12 percent to 15 percent; three, revised method for calculating real estate tax liability.

The property at February 17, 1982, is in essentially the same status it was in at December 31, 1980. However, the Williamson County Planning Commission has now refused final approval of the development plan citing the factors enumerated in the letter of June 23, 1981.

A revised development plan which takes into account the factors cited by the Williamson County Planning Commission in denying approval of the development plan, has been prepared by Mr. J. T. Ragsdale, development coordinator for the Temple Hills project. This revised development plan eliminates 409 potential building sites from the development plan, leaving only 67 building sites. A revised appraisal of the property considering only 67 building sites, and using the developmental approach described above, indicates a loss of in excess of \$1 million for the

completion of the development in accordance with the restrictive requirements of the 1981 letter of the Williamson County Planning Commission.

Therefore, it is my opinion that the (p. 681) property under these regulations has no significant market value other than that which someone would pay for open space. The application of the regulations by the Williamson County Planning Commission has thus damaged the owner of the property by \$1,035,000, the value of the property assuming approval of the development plan as submitted.

Is that a true and correct summary of your appraisals of this property, Mr. Hunt?

A. Yes, it is.

Q. All right. Mr. Hunt, tell us what your involvement with the Temple Hills development has been.

A. I've been involved in this project as an appraiser for several years. I first appraised it in 1976, at which time the owner was obtaining some financing. Appraised the property again when the state condemned 18 acres for Natchez Trace Parkway for the damages to that take, then I appraised it again for the Hamilton Bank in 1980. Then I updated that appraisal February the 17th of this year, '82, for the purposes here.

Q. All right. Now we referred in the summary of your testimony to the approach which you applied

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Testimony of Joseph Hunt
Cross-exam by Estes

(p. 693) CROSS EXAMINATION

BY MR. ESTES:

Q. How many times have you appraised the Temple Hills property?

A. Counting up dates, five times.

Q. All right, sir. When did you first appraise it?

A. 1976.

Q. What was the purpose of your appraising it at that time?

A. Financing.

Q. What kind of financing?

A. Developer financing for Mr. Patterson and the lender, I believe Security Federal.

Q. All right. Security Federal or Fidelity Federal?

A. You know, I don't recall.

Q. All right. When did you next appraise it?

A. Next time I appraised it was for the condemnation of Natchez Trace Parkway.

Q. Before the condemnation, before the take?

A. Yes.

Q. Or Afterwards?

A. Well, for the take. In other words, in that type appraisal you appraise it before and

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*Testimony of Joseph Hunt**Recross-exam by Estes*

(p. 716) best use confirms that, that that use is the use that will return the maximum benefit to the owner of the property.

Q. All right, sir. Thank you.

RECROSS EXAMINATION

BY MR. ESTES:

Q. Maybe one more question brought on by that.

In terms of the highest and best use, let me ask you this. Did you use the highest and best use in appraising the Natchez Trace taking?

A. Yes, I did.

Q. All right. Did you say on direct while ago that you appraised that as raw land? Raw undeveloped land?

A. I appraised it the same as I did this land. Raw lands with potential subdivision development. It was based on 20 acres would yield X number of lots times the same process.

Q. You have concluded at this time or your figures are based on a conclusion by you at this time that the remaining land in Temple Hills there is not worth anything?

A. Based upon the regulations of the Planning Commission, the eight points that reduced the (p. 717) density by slope and the other requirements.

Q. It just doesn't have any value?

A. No, other than what someone would pay — I said no significant value. Anybody will pay something for some

land just to have some land, but there is no measurable value because the property can't be developed economically.

Q. Doesn't just raw land that's not considered potential for development in, say, Williamson County sell for a thousand, \$2,000 an acre?

A. Not like this land. This land is zoned in a manner that it won't permit farming, only permit a single family, multi-family use, the nature of the land is not conducive to farming anyway. The only use is for subdivision development. It's not economically feasible to develop the property under these regulations, based upon the assumptions I submitted in my appraisal.

Q. All right. You are assuming also by that statement that one couldn't get it rezoned for any other purpose?

A. I did not consider rezoning.

Q. All right. That's all.

MR. NEBEL: Your Honor, we call Miss

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*Testimony of Gail T. Moyer**Direct Examination by Nebel*

(p. 719) Board of Zoning Appeals it was my duty to take the minutes of the meeting and to either prepare the written minutes myself or have them prepared by personnel in the Planning Commission's office, review those minutes and then submit them for approval to the members of the Board of Zoning Appeals.

Q. All right. Miss Moyer, I'll hand you what's already been admitted into evidence as Plaintiff's Exhibit No. 25 and 24 and ask you if you recognize that document?

A. Yes, sir.

Q. All right. What are they, Miss Moyer?

A. These are the minutes of the Board of Zoning Appeals meeting conducted on November the 11th, 1980, with attachments that were presented that night on certain items that we considered as well as the agenda for that night.

Q. All right. Miss Moyer, now were you present on the evening of November 11, 1980, when that meeting took place?

A. Yes, sir, I was present.

Q. All right. Do you recall those events?

A. Yes, sir.

Q. If you will, I would like to take a few (p. 720) moments and go over those minutes and ask you to identify the action that was taken by the Board of Zoning Appeals that night.

Miss Moyer, referring I think on page three, item Roman numeral four, I believe that's where the action concerning Temple Hills was where they reported that?

A. Yes, sir.

Q. If you will, please, describe what happened at the board that night.

A. Okay. One — this was one of the items on the agenda that night. We had the full board present that night, there were five members that serve on the Board of Zoning Appeals. Present for this particular matter was Mr. Tom Ragsdale, representing certain people involved in the Temple Hills development. Also present that night

were some county officials: Mr. Mort Stein, who was serving as county planner at that time, and the county attorney, Mr. Mitch Crawford was present at that time.

When this matter was brought to the meeting, Mr. Ragsdale was recognized and asked to present any information he wanted the board to consider in making a decision on the request (p. 721) brought to us at that time.

Q. What request was brought to you at that time?

A. We had been requested by Mr. Ragsdale for members involved in the Temple Hills development to interpret the zoning regulations as to whether or not the Temple Hills development had been approved under the '73 zoning regs and whether or not they, at the present time in 1980, were to be developed under the '73 regulations or under the 1977 zoning regulations, which had been adopted by the county commission or the County Court at that time.

Q. All right. Did Mr. Ragsdale or anybody else make you aware that approximately one month before the Planning Commission had denied the Temple Hills preliminary plat?

A. Yes, sir. He stated at that time that he had met at the — some meeting in October with the Planning Commission and that was the result of that meeting.

Q. All right. What factors did the Planning — or excuse me — the Board of Zoning Appeals consider that night?

A. Well, the first thing we did, because of the nature of the Temple Hills controversy, most of (p. 722) the Board of Zoning Appeals knew that it had been an involved situation. And we were requesting a narrowing of the

issues because there had been a lot of things said. So three issues were present that night for consideration.

Q. Temple Hills, had it been a political hot potato down in Williamson County for some time?

A. Yes, sir, for years and years.

MR. ESTES: I object to political hot potato. That can mean anything.

THE COURT: I'll sustain it.

BY MR. NEBEL:

Q. Had there been a considerable amount of controversy concerning Temple Hills?

A. Yes, sir.

Q. All right. Go ahead. You limited the issues. What issues did you address and what factors did you consider?

A. The first issue that was addressed was whether or not the Temple Hills development was to be developed under the '73 zoning regulations or whether or not it was to be developed under the 1977 zoning regulations. And in that connection Mr. Ragsdale was recognized and he wanted to give some background for the members of the Board of (p. 723) Zoning Appeals to consider. And he presented several documents as well as discussing these documents and answered questions concerning these documents.

He first gave us background concerning the zoning that existed in 1973, which was called residential cluster development under the '73 zoning regs. He related the cluster development to the county plan that was in existence at that time in 1973. He pointed out different features that

the county plan emphasized in residential developments, and that they encouraged at time a high density under this plan for residential developments in the northern area. Temple Hills is in the northern area of Williamson County.

Q. That was my next question, whether it was in the northern area of Williamson County?

A. Yes, it is.

Q. So next it was consistent with the county plan?

A. Yes, sir. Yes, sir.

Q. All right. Go ahead.

A. Then he pointed out under the county plan that a discussion in the county plan related to water, sewage, underground utilities, several other (p. 724) factors that he related to us exist in the Temple Hills development. They had followed the county plan as it stood in 1973 for high density areas or cluster developments.

Q. All right.

A. Another thing that was pointed out to the Board of Zoning Appeals at that time was the concept of cluster development. In 1973 this was a new concept in our county. But had been an approved concept by the adoption of the zoning regs. It was something that could occur in the county and was meeting with approval.

The Board of Zoning Appeals needed to know that cluster housing was different than the normal subdivision concept that had existed at that time.

Q. All right.

A. Instead of the basic concept of one unit per half acre or whatever existed at this time, cluster housing allowed the housing to be closer together, although a certain

amount of space would still have to be provided in the zoning regs. So that concept was discussed and how the zoning board approved that and how the regs provided for that.

Another thing that was brought out in the discussion that night in front of Board of Zoning (p. 725) Appeals was fire protection. Mr. Ragsdale pointed out and read to us and gave us documents where the county plan stated that the county should look to having fire service available for these areas, and that he also pointed out what it said about fire plugs and emphasizing that type of thing.

Q. Right. Now did you know at that time or since that time of any developer other than the developer of Temple Hills who had been required to provide fire protection service?

A. The developer himself?

Q. Yes.

A. No, sir.

MR. ESTES: If the court please, I object to this. I don't know how she would have any real knowledge of that, so her lack of knowledge I don't think had any probative value.

MR. NEBEL: She's on the Board of Zoning Appeals out there in Williamson County.

MR. ESTES: That's not the Planning Commission though. You are not there all the time, by a long shot. Almost none of them do.

THE COURT: He is beginning to ask another question.

BY MR. NEBEL:

(p. 726) Q. On the Board of Zoning Appeals, do you attend most of the meetings of the Board of Zoning Appeals?

A. Yes, sir. I was a member, yes, sir.

Q. All right. That was right up until January—

A. Of 1982.

Q. That was from '77, you were serving through '82?

A. About '75 through '82.

Q. All right. Now during that time period did you hear appeals concerning different pieces of property in different subdivisions in Williamson County?

A. Yes, sir.

Q. All right. Do you know whether or not the Board of Zoning Appeals heard appeals for variances or requested variances or issues relating to all or most of the subdivisions in Williamson County?

A. Yes, we did.

Q. As a part of your responsibility on the Board of Zoning Appeals, do you review a Board of Zoning Appeals map?

I mean a zoning map.

A. We would review plats occasionally of (p. 727) subdivisions when they would want set backs, mainly it was just specific lots, but we would have to make reference to subdivision plats.

Q. All right. Now based on your knowledge of the different subdivisions that appeared before you, at issue

in the Board of Zoning Appeals, do you know of any other developer who has had a requirement of fire protection put on them in connection with a good development?

A. No.

MR. ESTES: Of course, if the court please, I don't think he has established that she would necessarily have that knowledge. She says she has occasionally reviewed some plats.

MR. NEBEL: Your Honor, I think that might go to the weight of her testimony, but not to the admissibility. She's testified she's worked with the plats in all or most of the subdivisions. She knows. I think she's entitled to state whether she knows of any other developers who has had to provide fire protection.

THE COURT: I'll overrule the objection. I think that the jury understands that she was not in a position to know absolutely whether or not anyone had ever come in. So with (p. 728) that understanding, you can ask her if she did have. In other words, she might see it, she might not.

BY MR. NEBEL:

Q. All right. Did you know of anybody else, any other developer who had to provide fire protection in their development?

A. No, sir, I did not know of any.

Q. All right. If you will, please, on the second paragraph on page five, if you would read the sentence that's quoted there. Beginning the county?

A. Yes, sir. This is concerning—as I said, Mr. Ragsdale was referring to the county plan and what it said

about fire protection. And he quoted to us and we read at that time from the document provided, quote, the county should negotiate with municipalities having fire departments and private fire departments for those departments to serve residents in outlying areas.

Q. All right. What other factors were brought to the Board of Zoning Appeals' attention that night?

A. After discussion of the relationship of the county plan to the existing '73 zoning regs at the time Temple Hills was commenced, he also (p. 729) brought to the attention of the Board of Zoning Appeals minutes from the Planning Commission as well as several letters and other documents which related to the approval of the Temple Hills development back in 1973.

Q. All right.

A. He brought to us the minutes of a May, 1973 meeting from the Planning Commission which indicated that—

MR. ESTES: If the court please, those speak for themselves.

MR. NEBEL: I have no problem with that, Your Honor.

THE COURT: All right.

BY MR. NEBEL:

Q. Let me ask you this. Do you recall any discussion concerning that formula at the Board of Zoning Appeals that night?

A. Yes, sir. One of the—some of the discussion later on that evening was the differences between the residen-

tial cluster development requirements under the '73 zoning regulations and the open space residential zone that appeared in the 1977 zoning regulations.

Q. Discussed differences between the '73 (p. 730) and '77 zoning ordinances.

A. Right.

Q. All right.

A. One of the differences was in density.

Q. All right.

A. As part of that discussion it was indicated that a formula had been developed and that under the '73 zoning regulations to compute density in the residential cluster developments.

Q. All right. That night was there anybody sitting on the Board of Zoning Appeals who had been on the Planning Commission in 1973?

A. Yes, there was.

Q. Was that Mr. Harry Sanders?

A. Yes, sir.

Q. Did Mr. Sanders corroborate the use of that formula?

MR. ESTES: Objection. That calls for hearsay.

MR. NEBEL: It's not offered to prove the truth. It's offered to prove the factors and the motivation that went in the Board of Zoning Appeals' decision on November 11, 1980. It's not to prove that formula was actually used in '73, just actually used to prove that the Board of (p. 731) Zoning Appeals considered it.

THE COURT: I suppose you can ask if anybody disagreed with it.

BY MR. NEBEL:

Q. Did anybody disagree with the use of that formula?

A. No sir, there was no disagreements or discussion other than that was the formula that existed.

Q. All right. Go ahead. What other factors were considered by the Board of Zoning Appeals that night?

A. Okay. As I stated, the minutes of a May, 1973 meeting or a portion of those minutes was presented to us. Also a staff report that was written by the staff at that time summarizing the events of that particular meeting was introduced to us, and was read.

Q. That was a county planner, Mr. Bob Martin?

A. Yes.

Q. His staff report?

A. Yes. Then several letters were introduced to the Board of Zoning Appeals that night, by Mr. Ragsdale. These were letters that had been written and were on file in the Planning Commission dealing (p. 732) with requests made by other people to Mr. Ragsdale to give a report on the status of Temple Hills.

Q. All right.

A. One letter—there were just several letters, and all those letters—the main purpose of those being presented to the Board of Zoning Appeals that night was to show that the letters each reflected that the Temple Hills subdivision had been approved.

Q. All right. Well, what was the action taken concerning the issue—well, did you hear from Mr. Stein or any other representative of the county after Mr. Ragsdale made his presentation?

A. Yes, sir. After Mr. Ragsdale's presentation, we asked the county to give us their discussion on this. Mr. Stein conducted that discussion and we asked him questions and he responded to questions we had raised, plus he had some other points to point out to us.

Q. All right. Did Mr. Stein take issue with the idea that 736 lots had been approved in 1973?

A. No. He didn't take issue with 736 being approved in that sense. That that information had been given us and that wasn't a point of contention. The point of contention was whether or not that was (p. 733) the figure that could be brought up to the present time and still be utilized as the number of total units to be allowed in Temple Hills.

Q. What was the total number that Mr. Stein saying the developer of Temple Hills was entitled to?

A. It was 400 something. I'll have to—it's reflected in the minutes.

Q. All right. If you will just take a moment and find that.

(Brief moment.)

BY MR. NEBEL:

Q. I believe you will find that on page 12.

A. All right. Yes sir. 469 lots as well as 38 condominiums. Those were the figures that Mr. Stein was

saying were the only number of units that had been approved. In the sense that was the only ones that could now be developed.

Q. All right. Now did the Board of Zoning Appeals make a decision that night concerning whether the '73 or '77 zoning ordinance was applicable?

A. Yes, sir. After a very lengthy discussion, it was very detailed, we tried to give everybody the opportunity to present whatever evidence or (p. 734) discussion that we should, somewhere in our decision, and we had some questions of our own that were answered by the people there that had knowledge of the facts. A motion was made by Mr. Sanders that the '73 zoning regulations were the applicable zoning regulations to be applied to Temple Hills, and unanimous vote was given to that motion.

Q. All right. Did that include the 736 number? Was that part of the argument that night?

A. Yes, sir. That was part of the argument.

Q. Now did the Board of Zoning Appeals consider any other issues that night?

A. As far as Temple Hills, yes, sir. There were two other issues that were brought by Mr. Ragsdale when we asked that the issues be defined. One of them dealt with the manner of computing slope and the other dealt with a certain parcel of land that had been removed from the Temple Hills development.

Q. And on the issue of slope, what did the board decide?

A. After discussion from Mr. Stein and Mr. Ragsdale, motion was made by Ed Jagers, a member of the

Board of Zoning Appeals, that slope be (p. 735) defined in a certain manner and that manner was basically the manner that had been used early on in '73 up to just recently before the Board of Zoning Appeals meeting.

Q. All right. Now after that time, did—well, let me withdraw that.

Your Honor, if I might have just one second.

THE COURT: All right.

(Pause.)

BY MR. NEBEL:

Q. Was there any member of the Planning Commission, the present Planning Commission—I say present—was there any member of the Planning Commission who was sitting on the Planning Commission on November 11, 1980 in attendance and on the Board of Zoning Appeals that night?

A. Yes, sir. Part of our requirements on the Board of Zoning Appeals is that a member of the Planning Commission serve as a member of the Board of Zoning Appeals, and that particular member at that time in November was Joey Davis.

Q. All right. Now you testified Mr. Sanders had been on the Planning Commission?

A. Right.

. . .

Testimony of Gail T. Moyer

Cross-Exam by Estes

(p. 742) about amendment to it now that was in effect at that time—without regard to this, provided however that

the density shall be computed on the basis of total acreage, less 50 percent of the land lying in flood plain, as shown on an official flood study, unless 50 percent of all land lying on a slope with a grade in excess of 25 percent?

Were you aware of that in those 1973 zoning ordinances?

A. Yes, sir.

Q. That would obviously change that formula that you referred to up there on the board, wouldn't it?

A. Not unless those specific things were in there.

Q. All right. But if there were slopes in the land that was sought to be approved for a cluster development, that had slopes in excess of 25 percent, that that formula would be wrong for trying to figure density, wouldn't it?

A. Yes, sir.

Q. You would have to add some other factors in there, wouldn't you?

A. Yes, sir.

Q. All right. Let's see if we can write a (p. 743) formula that would apply. See if I can help you a little bit.

Assuming we had 776 acres, like they assumed on that formula, okay?

A. Uh-huh.

Q. All right.

(Pause.)

BY MR. ESTES:

Q. Now, assuming that we are talking about a subdivision that did have some slopes in it in excess of 25

percent but did not have any land in it that was in a flood plain, okay? Have I left out anything in my calculations for a flood plain? Okay.

Would that be the proper formula that I have just put up there?

A. Without having it in front of me, I would say from what you read and my familiarity, yes.

Q. I'll be glad to show it to you so you will understand. That's the '73 zoning ordinance.

A. The only problem I have with your formula is in the use of the word number of acres.

Q. Some number of acres?

A. Yes, sir. Which you say 50 percent of the number of acres. The formula that's set forth in (p. 744) the zoning regs just makes reference to 50 percent of all land without being definitive as you are on the number of acres.

Q. All right. How do we talk about land other than by the acres? You want to talk about the number of square feet in an acre?

A. Well, I was just pointing out that discrepancy from the language of the zoning regs it just makes references to all land lying, you have made it more definitive.

Q. All right. If you have a better suggestion, I'll be glad to consider that.

A. No, sir. I have no better suggestion, just that difference in what the zoning regs say.

Q. All right. You do agree a standard acre is 43,560 square feet?

A. Yes, sir.

Q. And that the Williamson County Planning Commission had been allowing in certain developments, an acre consisting only of 40,000 square feet?

A. Yes, sir.

Q. That's the reason you put the 43,560 on top and divide it by 40,000, isn't it?

A. Yes, sir.

(p. 745) Q. Assuming you start out with one lot or one dwelling unit per acre, you are going to get a few more numbers of dwelling units allowable on the number of acres than the number of acres itself?

A. Yes, sir.

Q. All right. So that's figured in, isn't it, in that formula?

A. Yes, sir. Yes, sir.

Q. Assuming that you had 676 acres starting out with, and use of the formula that I put up there that you say is correct, with your assumption there, or your qualification, say we had 80 acres that had slopes in excess of 25 percent. Let me ask you if this wouldn't be approximately correct as far as the maximum number of lots that would be in the subdivision. Start out, would you

not, with 676 minus 80—I'm sorry—minus 40, wouldn't you?

A. Yes, sir.

Q. All right. 50 percent of those acres with slopes greater, that would be minus 40, times 43,560 divided by 40,000. Am I correct so far?

A. According to your formula, that's correct.

Q. All right. So then you would end up with 636 times 43,560 divided by 40,000, wouldn't you?

A. Yes, sir.

(p. 746) Q. I'll have to get my calculator out.

MR. BAILEY: We will assume your calculator is accurate, Counselor.

BY MR. ESTES:

Q. All right. If those assumptions were true, then you would end up with about 692 lots, wouldn't you?

A. Yes, sir.

Q. All right.

A. If your figuring is correct. I have no idea whether that's true or not.

Q. I'll loan you the calculator.

A. I am assuming they are true. Your formula as you worked it out appears to be correct.

Q. All right. Now under the '73 zoning ordinances, my formula would be correct and not the other formula, isn't that correct? Assuming there are slopes in a subdivision that a cluster development is going into that are in excess of 25 percent?

A. Yes, sir. That's what the zoning regs specify.

Q. All right. Now at this meeting of the Board of Zoning Appeals, was a letter presented to the Board of Zoning Appeals dated November 6th,

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Testimony of Ralph Killebrew
Direct Examination by John Bailey

(p. 804) please, at this time of course the Planning Commission had turned down Mr. Patterson and we submit as part of our theory in this lawsuit that his rights likewise inured to the benefit of the bank as of the date of the foreclosure. Now I realize that's something that will be subject to further discussion and argument, but that is our theory.

THE COURT: All right. I'll let him get that in. I don't think it's prejudicial. I'll instruct the jury to consider it.

MR. ESTES: All right. I might point out also that they knew that Mr. Patterson had been turned down when they bought the property.

THE COURT: All right. Just when the times comes we'll deal with what part of this should be included in my instructions.

MR. ESTES: All right.

BY MR. BAILEY:

Q. All right, sir. So the average fed fund rate for the 16-month period was what?

A. 15.97.

Q. All right.

A. May I comment on something that's been said? We did not buy the property. We already had (p. 805) the property. We just took it back.

MR. ESTES: He commented to me he bought the property at a foreclosure sale, he just stood there, Tom Nebel bid it off for him.

THE COURT: All right. All right.

THE WITNESS: Thank you, Counselor.

BY MR. BAILEY:

Q. All right, sir. The average fed fund rate, 15.97 percent. Now on an investment of \$1,850,000, what would that turn into in terms of cost? Cost of care?

A. For the 16-month period it would turn into \$393,926.

Q. All right. You understand we are cutting off March 31st because that's our last date. We have more costs come up.

What's the number again?

A. \$393,926.

Q. All right. All right. Now what other costs has the bank incurred during this period of holding the property? Since its acquisition of it?

A. Do you want a total figure or do you want it detailed?

Q. Why don't you break it down for me?

A. All right. Through March 31st we paid Mr. (p. 806) Ragsdale \$54,900.

Q. Just a minute. Fifty-four thousand?

A. Yes. —900.

Q. —900. All right. All right, sir. What else?

A. Utilities including gas, electric and water and so forth—

MR. ESTES: If the court please, utilities, they would be required to pay utilities if they were out there selling ten lots a day.

BY MR. BAILEY:

Q. All right. This is utilities on your sales office and so forth out there at the project?

A. Sales office, the entrance, lighting and certain —Mr. Ragsdale can better answer that than I can.

MR. ESTES: Your Honor, they haven't attempted to sell a lot out there. That's clearly inadmissible.

MR. BAILEY: I didn't hear you.

MR. ESTES: I said they haven't attempted to sell a lot out there.

THE WITNESS: We don't have a lot out there.

THE COURT: All right. Just let the (p. 807) lawyers speak.

MR. ESTES: If the Court please, he just said this was utilities for electricity to the sales office out there. Now my understanding is they haven't attempted to sell a lot out there since they bought this property. So I

don't know why they should be able to admit into evidence utilities for a sales office out there.

THE COURT: I'll let him give the figure again. And then we can argue over which of this is actually admissible. I said I don't think it's prejudicial.

BY MR. BAILEY:

Q. All right, sir. Utilities?

A. 1,851—you want the pennies?

Q. No.

A. All right.

Q. What else? You can lump—you have got some miscellaneous items. Just give the group and lump them together. Give what's included in and lump them together.

MR. ESTES: I want to know what they are.

MR. BAILEY: All right. Fine. Fine.

THE WITNESS: All right. What I'm (p. 808) listing is all expenses that we have involved in Temple Hills since the foreclosure?

BY MR. BAILEY:

Q. That's right.

A. Telephone expense of 624.76.

THE COURT: Let's have the attorneys approach the bench just a minute.

(Discussion held at bench without reporter.)

THE COURT: Why don't we take a brief recess?

(Recess held.)

THE COURT: Okay. Be seated.

THE COURT: Can we move on to something else at this time?

MR. BAILEY: Yes, if Your Honor please. My understanding is that we would move to have the listing of the expenses admitted as an exhibit at this time.

THE COURT: All right. We'll mark it for identification. I will.

MR. BAILEY: Subject to objection of counsel.

MR. ESTES: I reserve objection to its admissibility.

(p. 809) MR. BAILEY: I'll have to provide it in another form because I don't have it in that form but I will do that.

THE COURT: All right. Let's bring the jury in.

(Jury enters courtroom)

BY MR. BAILEY:

Q. Now, Mr. Killebrew, at the time of the foreclosure of the property the Hamilton Bank of Johnson City received its successor trustee deed to the property, did it not?

A. Yes.

Q. All right, sir. During the spring of 1981, what were your efforts relative to seeing the project on its way, what meetings do you recall having during that period of time?

A. I recall meeting with Mr. Ragsdale and I going down to the courthouse and meeting with Mr. Stein and I think Mr. Martin came in to discuss the development of the subdivision.

And Mr. Ragsdale's first responsibility was to prepare a new plat or a plat that would show how we would propose to develop out the balance of Temple Hills, and he was working on that and I believe in February of 1981 he had completed that (p. 810) and we called a meeting of the homeowners in Temple Hills. And Mr. Nebel and Mr. Ragsdale and I were there. We presented the plat, informed them that officially for the first time that Hamilton Bank of Johnson City was now the owner of the undeveloped portion of Temple Hills. That we were going to work diligently to get things going out there, get it moving and get some activity going and some houses built and that it would be to their benefit and would help the value of their property. They were very enthusiastic at the meeting. By and large, the large majority of them supported what we were going to do. We told them that we were on the agenda with the Planning Commission sometime in March, it was a couple of weeks from the night we had the meeting with the homeowners, and asked them to come out and support us at the meeting of the Planning Commission, which they did.

We presented the plan that Mr. Ragsdale had prepared to the Planning Commission. We had the support from the people at Temple Hills expressed at the meeting, we asked for a determination on the plat and in time they passed it without taking action and voiced some objections to such things as density and slope and grades. As (p. 811) I recall it, at that time, asked us to go back and rework and come back with something a little more definitive.

We did go back and Mr. Ragsdale and I met with the planner Mr. Stein and Mr. Martin and went over what

our plan would be, and asked for another meeting with the Planning Commission. That was in June, I believe, of 1981.

In the meantime we were advised by Mr. Stein, I believe, that the staff had come up with some eight objections to the plan that we had submitted earlier, and this had been an increasing number, some new objections that we had not had before. We appeared before the Planning Commission in June, at one of their June meetings, again we had some homeowners from Temple Hills there supporting our request for approval of the plan, and the culmination of that meeting was that the Planning Commission turned us down.

Q. All right, sir. Let me show you a copy of a letter dated June 23, 1981, addressed to you from the Williamson County Planning Commission. This is Plaintiff's 9035. Ask you if you can identify it.

A. Yes. That was the letter I was referring to. It was actually I believe written after the (p. 812) Planning Commission meeting. The 8th—the eight items on here were voiced at the Planning Commission meeting.

Q. All right, sir. That's basically these eight items that are summarized here on this chart, is that correct?

A. Yes.

Q. Following this final disapproval in June of 1981, what action did you take in behalf of the bank or direct to be taken?

A. Well, when the Planning Commission disapproved it, in order to know what our next step would be, we questioned them as to the decision of the Board of Zoning Ap-

peals and whether it would be advisable for us to go to the Board of Zoning Appeals with our objections to the reasons that they had not approved our plan. And we were informed at the time that they did not follow any orders of the Board of Zoning Appeals, that they would not follow any direction from them, that Mr. Crawford I think said that he had an opinion from the Attorney General that it was not within their jurisdiction and that they would not in effect pay any attention to them. So our last resort then was to go to court. That's why we are here.

(p. 813) Q. Assuming that you could obtain zoning approval for the property, what would be the bank's plan relative to the property, Mr. Killebrew?

A. Our plan would be to find a developer who would meet the criteria who would come in and sell the property to him, finance it for him and let him develop it out. We are not developers, ourselves, the bank's not, we have no expertise in that. We are lenders and that would be the position we resume if we could get a plan approved.

Q. Now have you been contacted by people from time to time concerning the property?

A. We have talked to several people who have expressed an interest. We have gotten calls from people who have expressed an interest. We have told them up front that we do not have — that the subdivision has not been approved for developing out by the Planning Commission, and that we were working on that. We would be glad to talk to them now or later, but no one wants to get involved in that. They want the property zoned and the plan approved.

Q. All right. Thank you.

MR. ESTES: You want me to go ahead and begin? Obviously I can't finish.

(p. 814) THE COURT: Why don't we take a recess and come back at nine o'clock in the morning? It is sort of late in the day.

I will remind the jury not to discuss the case with your friends and family. We'll see you in the morning. Thank you.

(Court adjourned.)

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*Testimony of Ralph Killebrew
Direct Examination by John Bailey*

(p. 818) them.

Q. All right, sir. I ask that that be admitted.

THE COURT: All right.

BY MR. BAILEY:

Q. Mr. Killebrew, I show you Plaintiff's 9851 — Plaintiff Exhibit 9851. I will ask you if you can identify that?

A. Yes, sir. This is a copy of the successor trustee's deed that I executed conveying the title to the undeveloped property of Temple Hills to Hamilton Bank of Johnson City.

Q. This was at the time of foreclosure, November 26, of '80?

A. Yes.

Q. Is that correct?

A. Yes.

Q. I ask that this be admitted in behalf of plaintiff.

THE COURT: All right.

MR. BAILEY: That's all.

CROSS EXAMINATION

BY MR. ESTES:

Q. Mr. Killebrew, you work directly for a

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Testimony of Ralph Killebrew

Cross-Exam by Estes

(p. 857) whether you were aware about a preliminary plat being approved at the time you bought this property back in '77.

Were you aware in December of 1980 when you purchased the property back from Patterson at the foreclosure sale on him that the undeveloped on the undeveloped portion of Temple Hills, that is the part that you all bought, that there was no approved preliminary plat at that time?

A. Yes, I understood that.

Q. All right, sir. And I asked you while ago of course whether you were aware of the 1973 zoning regulations earlier. Are you aware of them now?

A. I have not read the regulations in toto. I have read them, the paragraph you showed me, and I am aware of that, yes.

Q. All right, sir. Are you aware that the Planning Commission has no authority to waive a zoning ordinance?

A. No, I'm not aware of that.

Q. That's all, Your Honor.

MR. BAILEY: Just one moment, please, sir.

(Pause.)

MR. BAILEY: Nothing further of this

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Testimony of Tom Linton Kinnie

Direct Examination by Nebel

(p. 882) Q. All right.

Now, Your Honor, I don't have copies of these, we hadn't intended to introduce them as exhibits but they have been marked for identification.

THE COURT: All right.

MR. NEBEL: Be happy to provide copies later.

THE COURT: All right.

BY MR. NEBEL:

Q. I show you what's been marked for identification as Plaintiff's Exhibit No. 7002 and ask you if you can identify that document?

A. Yes, sir.

Q. What is that?

A. That's for the relocation of the six inch water main on Temple Road.

Q. All right. On Temple Road or Sneed Road?

A. Temple Road.

Q. Temple Road. All right.

Now would that have been required? First of all, what's the amount of money that that contract reflects was spent?

A. Approximately \$16,000.

Q. All right. Does that include the ten (p. 883) percent fee that they had to pay you for inspection?

A. True.

Q. All right.

Q. Would that money have been spent to relocate the line on Temple Road if the only property that had been built on had been these 200 lots that have already been constructed on it Temple Hills?

A. It's possible that a small section of it up at the far end might have had to be relocated, but the rest of it wasn't touched. The only part that was relocated is on past.

Q. All right. Well, would that \$16,000 have to have been spent if the project had only involved the 200 lots?

A. No. No.

Q. All right. Now I show you what's been marked for identification as Plaintiff's Exhibit No. 7003 and ask you if you can identify that?

A. Yes.

Q. All right. Now that's for on site water and sewer, is that correct?

A. That's true.

Q. Now the on site expenditures would be substantially the same?

(p. 884) A. Right.

Q. Is that right?

A. That's right. That's true.

Q. All right.

A. That's for putting the water lines in the streets.

Q. All right. Now those are the streets that have already been built on right through here?

A. That's true.

Q. You are going to have to do that whether you have 200 lots or 700 lots?

A. That's true.

Q. All right. Now I show you what's been marked for identification as Plaintiff's Exhibit No. 7004, can you identify that?

A. Yes, sir.

Q. All right, sir. What is the — what's that item?

A. Off site water contract for Temple Hills Country Club Estates.

Q. All right. Now of course referring to off site, we are talking about the improvements that were made before you even get into the development of Temple Hills?

A. That's true.

(p. 885) Q. All right. Now what is the amount that was spent there? What was it spent on?

A. Approximately eight — I can't add in my head — but about \$84,000, and that's to tie in Vaughn Road to Sneed Road for giving more pressure, more supply of water.

Q. All right. Would the developer have had to spend all that money if he were only going to build a 200 lot subdivision?

A. No, sir.

Q. Why not?

A. Well, wouldn't have needed that much water. Already had eight inch on Sneed Road and going up through there, that will serve more than 200 lots.

Q. All right. Show you another contract that's been marked Plaintiff's Exhibit 7005. That's again for on site sewer construction. Do you recognize that document?

A. Yes, sir.

Q. All right. Now again on site improvements would have been substantially the same or —

A. True. Putting the sewer in the streets.

Q. All right. Show you another one marked Plaintiff's 7006 and ask you if you can identify that?

(p. 886) A. Yes, sir.

Q. Is that again for off site improvements?

A. Yes, sir. True.

Q. What type of improvements off site?

A. This was the gravity sewer from Sneed Road down to the pump station on Highway 100.

Q. All right. Approximately how much are we talking about there?

A. \$200,000.

Q. All right. Would that expenditure have been necessary for a 200 lot subdivision?

A. No, sir.

Q. All right. I show you what's been marked for identification as Plaintiff's Exhibit 7007 and ask you if you can identify that document?

A. Yes, sir. I see it. I understand what it is.

Q. All right. What is it, sir?

A. This is for the pump station that was built at Highway 100 and Temple Road for the Temple Hills Country Club Estates.

Q. Approximately how much money was spent on that pump station by the developer?

A. About \$82,000.

Q. All right. Would that expenditure have (p. 887) been necessary if all he was going to build was a 200 lot subdivision?

A. Definitely not.

Q. All right. I hand you what's been marked as Plaintiff's Exhibit 7008. Do you recognize that?

A. Yes. I recognize it.

Q. Okay. That is for on site or off site improvement?

A. This is for on site for 64 additional lots in Temple Hills for water.

Q. All right. For water?

A. For water. Right.

Q. That would that have been spent in any event?

A. Yes, sir.

Q. All right. Plaintiff's Exhibit 7009, do you recognize that document?

A. Yes, sir.

Q. All right. That is for on site or off site improvements?

A. On site.

Q. Again that expenditure would have been made anyway?

A. That's for the sewer and for those 64 lots.

Q. All right. Here's 7010, Plaintiff's (p.888) Exhibit, is that for on or off site improvement?

A. This is on site, which we would have required to have been spent anyway.

Q. All right. Here is another contract for off site improvements, 7011. Do you recognize that?

A. Yes, sir.

Q. What was that for?

A. This was for the eight inch force main from that pump station to our plant at Bellevue.

Q. All right. I believe you testified earlier that you could have put in a six inch force main if you only had 200 homes involved?

A. That's true.

Q. All right. So would all of that money had to have been spent?

A. Not for an eight inch, no, sir. It wouldn't have been.

Q. You mean for a six inch?

A. This is eight, six would be considerably less.

Q. All right. Here is Plaintiff's Exhibit 7012. I believe that's for on site cost?

A. That's true.

Q. That would have been spent in any event, is that right? Or would it?

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*Testimony of Tom Kinnie
Cross-Exam by Estes*

(p.892) Q. All right. Do you play at Temple Hills?

A. Yes sir.

Q. Play there ever since the golf course was built?

A. Yes, sir.

Q. Are you a non-paying life member of that club?

A. Yes, sir.

Q. That was given to you, was it not, by the developer?

A. Yes.

Q. All right. Now you were talking about some of these utilities that would have to be constructed for building subdivisions of over 200 lots as opposed to not having to be built if it was a subdivision of less than 200 lots. So obviously if they were going to build, say, up around 400 lots or 469 lots, they would still have to go to the expense of extra expenses that you are talking about?

A. True. True.

Q. All right. Now you talked about a meeting of the Metropolitan Nashville Planning Commission that you attended. You said Mr. Kelly was there objecting to that body putting in — was it a 16

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*Testimony of Sidney Smith
Direct Examination by Nebel*

(p. 1003) that document is?

A. This is a copy of Planning Commission meeting minutes.

Q. April 20, 1978?

A. I assume they are. It's penciled in at the top. It's not enough here to see approval date or the date of the minutes.

Q. I believe the record will reflect — the entire record will show that's April 20, 1978. What action did the Planning Commission take concerning Temple Hills on that day?

A. I'm reading down. I need to just find where that's addressed. "Item IV, the developers of Temple Hills requested renewal and revision of its preliminary plan."

Q. What action was taken?

A. A motion was made by me, second by Pitts, and it was approved.

Q. All right, sir. So the preliminary plat was approved April of '78. I'll show you what's already been introduced in evidence as Plaintiff's Exhibit 1057, and these are minutes of the Planning Commission dated May 4, 1978, and I believe on this evening the minutes will reflect that Temple Hills, Section 4, a final plat on Section 4 came before (p. 1004) the Planning Commission. I've just got one specific question to ask you, sir. DBST?

A. Double bituminous surface treatment.

Q. Was that commonly referred to as oil and chip?

A. Yes.

Q. Was that something that was required in 1973 standards as opposed to '75 and '77 standards out there in Temple Hills?

A. I don't remember the dates on when that was current, but whatever was — or whenever the Planning Commission approved the preliminary p'at, whatever the current road requirements were at that time, that was required.

Q. You mean at the initial approval?

A. Yes.

Q. All right. Now, this May 4, 1978, if you will just briefly read that for a minute and tell us what road standards were approved at Temple Hills.

A. The engineer requested that Sections 1 and 3, that the roads be completed, that they were completed, and he requested the release from the performance bond and be picked up under maintenance status. On Section 4 development they proposed to (p.1005) construct roads DBST until 80 percent of the homes were completed in each lot. At that time curbs would be set and the final pavement would be installed.

Q. Section 4 approved that night?

A. Best of my knowledge it was. Yes.

Q. All right.

Mr. Smith, if you will, please, have you reviewed certain exhibits in connection with this trial at my request?

A. Yes, sir.

Q. All right. Now, I'll show you what has been marked and what has already been admitted into evidence as Plaintiff's Exhibit 9708. Now, in connection with your review of this exhibit did you also review certain minutes of the Williamson County Regional Planning Commission concerning a disapproval of Temple Hills plat in May or in June of last year?

A. I saw several points. I don't remember exactly how many there were grounds for denial of approval.

Q. I'll show you this list of reasons here. Are these the eight reasons that you reviewed in connection with your review of Plaintiff's Exhibit

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Testimony of Sidney Smith
Direct Examination by Nebel

(p.1009) Q. If you would, please, if you are faced with a subdivision like Temple Hills, how do you go about calculating slope for density purposes and compare it to what was done on this plat?

A. Well, you would see what the area unacceptable, the criteria is. In this particular case, 25 percent slope. Anything at or above 25 percent is not to be built on. Then you would look at the scale of the map in that particular case, as I remember, that map is a one-inch to 100 map. I believe that's right. I'd have to look in detail to see. And then you look at the contour interval; and, as I recall, that contour interval is two feet with heavy contours on ten-foot intervals.

Q. It might be helpful for the jury if you could actually come down and demonstrate what you are talking about, with the Court's permission.

Tell them what you're using there and tell them exactly what you are doing. Maybe we could move out.

A. What?

Q. Assume none of us know anything about contours and explain it to —

A. A contour line on a map like this indicates, if you pick one particular line, I'll

. . .

Testimony of Sidney Smith
Direct Examination by Nebel

(p. 1017) step back and take a seat again.

Tell us what other factors you considered in reviewing Plaintiff's Exhibit 9708 here, what assumptions you made.

A. Well, the exhibit made there was not made by me. I was just asked to see would it or did it comply with the conditions shown here.

Q. Let's take those conditions one at a time. If you will, please, just read the first reason that's stated on that list of —

A. The proposal does not comply with the density requirements of the zoning resolution of the County. We have calculated that there are 65.75 acres to be deducted for the 10 percent of the road and estimated that there are 88 acres with slopes greater than 25 percent. Therefore, the maximum number of units would be 548.

Q. Essentially, what you have done then in connection with that, you've assumed that the areas marked in green had to be eliminated; is that correct?

A. Yes.

Q. And you've also assumed that the acreage figure down there for roads has had to be eliminated, too; is that correct?

(p. 1018) A. Yes.

Q. What's Item No. 2?

A. There are two cul-de-sacs that are in excess of the subdivision regulations, Canterbury, 5,000 feet in length, and roads A, B, and C over 3,000 feet.

Q. You also took a look at the preliminary plat or a plat that was done that showed those two cul-de-sacs; is that correct?

A. Right.

Q. You've assumed that the cul-de-sac lanes could not exceed —

A. If you go by this requirement, they could not.

Q. You just assumed whatever was on that piece of paper; is that correct? Would that be the case?

A. Right.

Q. What was the third item?

A. There are road grades in excess of the Williamson County road regulation maximum grade requirements.

Q. Okay. Now, what information did you review in connection with that?

A. Look again at the topo map and you could (p. 1019) see cases where it's extreme, but before you really would say — if you were close to being on borderline, probably need to be done in the field, field checked.

Q. Okay. But in connection with that you've just once again assumed what the Planning Commission said and that list of reasons to be true?

A. Yes.

Q. What was the next reason?

A. There are lots shown on land that is in excess of 25 percent grades. This land should be in open space.

Q. That once again relates to the green shaded area on the topo map?

A. Yes.

Q. What's the next item?

A. Temple Road is the main access road for the development and cannot handle the traffic by the proposed development because of the condition of the road.

Q. That really didn't affect your review of this plat?

A. No. That has nothing to do with layout or the plat itself.

Q. To your knowledge, there hadn't been any (p.1020) plots as having been eliminated because of that reason?

A. No.

The confusion of responsibility and progress for installing underground electric service in Sections 4 and 5.

Q. Again, that didn't really affect your computation of what would be allowed in your review of Plaintiff's 9708; is that correct?

A. Well, I didn't know who owns it. It just said it was different ownership than the balance of the property.

Q. Okay. Is that this area right here marked in white?

A. To the best of my knowledge, yes.

Q. What is the next item?

A. There are inadequate services to provide fire protection for multi-family units to this development. Also, there are no recreational facilities for children and residents in the areas for multi-family houses. The only open space is limited to members of the country club.

Q. Once again, what I'll ask you is, was that the figure or the eighth reason?

A. That's the seventh.

(p.1021) Q. What was the eighth?

A. The lots do not meet the minimum size of one-half acre in road frontage and 125 feet of our subdivision regulations.

Q. Did you take that into consideration?

A. Yes.

Q. How is that affected and why?

A. That makes the lots, even the cul-de-sac lots extremely wide on the front. Use up a lot of land. I'm not sure if this is, in fact, true now, but it was my understanding when I was in the Planning Commission that it was 125 feet on normal straight road lots or 125 feet at the setback on cul-de-sac lots, and cul-de-sac lots are pie shaped, narrower on the front and wide on the back.

Q. And was it your understanding that that requirement applied to cluster developments like Temple Hills?

MR. ESTES: Object, if the Court please, unless there's some basis for that.

MR. NEBEL: He was a member of the Planning Commission.

MR. ESTES: Speak for themselves.

THE COURT: I think he said from the best of his recollection that's what the rule was.

(p. 1022) MY MR. NEBEL:

Q. All right. Mr. Smith, did you take that factor into consideration though in determining which areas are buildable?

A. Yes.

Q. All right. Now, I guess, in essence, what you are telling us is, you took the eight reasons listed on that sheet and determined whether or not the area in orange had to be eliminated.

MR. ESTES: If the Court please, I'm going to object to Mr. Nebel actually testifying for him. He's leading him.

MR. NEBEL: I'm just summarizing what he just testified to a moment ago, trying to clarify.

MR. ESTES: That's inadmissible, too.

THE COURT: Okay. I'll sustain the objection.

BY MR. NEBEL:

Q. All right. If you will, please, tell us then what your analysis of those eight reasons showed on what amount of property could be developed out there at Temple Hills.

A. If you follow these rules or these conditions that are listed here, you will end up (p. 1023) with the number of lots there shown in yellow or less, possibly a couple, two or three less.

Q. All right. So there may be a couple of lots shown on here in yellow that your analysis indicates —

A. You might not get.

Q. Might not get. Certainly get no more than that?

A. No.

Q. What about this orange area? What about that?

A. That is lost as far as yield for the development is concerned.

Q. All right, sir. Now, you have indicated you were on the Planning Commission. When did you get off the Planning Commission in Williamson County?

A. I think it was in mid '78.

Q. If you will, please, describe what led — did you resign or were you —

A. I resigned.

Q. Why did you resign?

A. There were a couple of reasons. No. 1, the Planning Commission met twice a month at night and the meetings were fairly lengthy, and I was on

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*Testimony of Morton Stein
Direct Examination by Estes*

(p. 1106) entered, if the Court please.

BY MR. ESTES:

Q. Okay. I'm going to refer you to Exhibit No. 96, which has already been admitted. I believe that's the

minutes of the meeting of the Planning Commission of January the 3rd, 1980, is it not?

A. That is. That's correct, sir.

Q. All right. What, if anything, was done with regard to requiring an overall plan for Temple Hills?

A. Well, at that time it was brought out that there were surveyor's errors in the original preliminary plan; this was brought out when they submitted Section 8. Also, it was brought out that the Trace, which was being taken or had been taken, had never been shown on the preliminary plat and that —

Q. Has the Planning Commission ever been advised, is this some land that was being taken out there for the Natchez Trace?

A. We had been advised and we had asked them to place it on a preliminary plat, and they kept saying that it's not final yet, and we kept asking them to show us where it was. We didn't know where it was. We wanted to see what effect it would have

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*Testimony of Morton Stein
Direct Examination by Estes*

(p. 1108) reapproved for a one-year period through August of 1980, so we gave them essentially eight months to come up with a plan. We said for the complete development, and that before another plan, you know, that we wanted them — before another preliminary plat was presented to us for approval that they have the complete layout of the development.

Q. All right, sir. And did they come up with that?

A. They came up with it later on. It was not in August. It took them about a few — they had to have about a six weeks' extension of that.

Q. Is that the plat that Mr. Patterson, the former developer, finally submitted to the Planning Commission sometime in September 1980 that was considered in October 1980?

A. Yes, sir. That was the one.

Q. And is that the first time that the Planning Commission had been presented a plat, preliminary or otherwise, showing the Natchez Trace take and therefore showing those two long cul-de-sacs?

A. Yes, sir. That was the first time.

Q. And at the same time did they show where the survey error was or not?

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*Testimony of Morton Stein
Direct Examination by Estes*

(p. 1125) approximately 5,000 feet in length and the other was approximately 3,000 feet in length.

Q. What is a cul-de-sac?

A. Cul-de-sac is a dead-end road.

Q. And it was caused by the fact that part of the property was taken for the Natchez Trace Parkway; is that right?

A. That's right.

Q. Is this October 1980 plat the very first time that cul-de-sacs have appeared on a plat submitted to the Planning Commission for Temple Hills?

A. Yes, sir.

Q. All right. And there's some indication that the preliminary work had begun to take the Natchez Trace Parkway property many years before that, is that true or not?

MR. NEBEL: Objection, Your Honor, not establishing more of a foundation.

BY MR. ESTES:

Q. When did the Commission know that there might be some property somebody would take away from the subdivision out there?

A. The first time I found out, when I first came there Mr. Ragsdale informed that they had been

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1127) tell them how to design their subdivision, but we did make suggestions on how to comply with our regulations.

Q. All right.

A. And Mr. Ragsdale worked on it, I think, diligently with the committee, and we came up with several different ideas on how to design it, and that was redesigned. We had asked — we had also the first time, it

was the first time I had ever seen the two-foot contour maps. These are the large maps that have been shown was in the first of 1980. It's the first time I had ever seen these maps. The only ones we had were these maps here, which are on 20-foot intervals, and it's very difficult to read those intervals because they fade out. They're fairly faded, and this is the first time that we had really good, accurate — we felt accurate topographic maps, and the staff — I had asked Mr. Martin, who was the engineer at that time, to identify the steep slopes.

Q. All right, sir. Can you identify steep slopes from the standpoint of running roads through a subdivision like this from those 20 feet — did you say 20-foot contours?

A. Yes. Well, the 20-foot contours were

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Testimony of Morton Stein
Direct Examination of Estes

(p. 1133) the roads?

A. Yes, sir. I came up with a figure of 548.

Q. 548?

A. Right.

Q. All right, sir. What, if anything, else did you find about the — well, first of all, let me ask you this: What did that October 1980 plat ask for in terms of total number of dwelling units to be put in there?

A. 736.

Q. 736?

A. Yes, sir.

Q. All right. Now, state whether or not that was the first time that that number of units had been platted and submitted to the Planning Commission for approval.

A. That was the first time the 26 units had been platted.

Q. All right, sir. What, if anything, else did you find with regard to whether or not the October 1980 plat complied with the subdivision regulations and the zoning regulation?

A. We found that there were two cul-de-sacs that were far in excess of our subdivision regulations. They were — one was 5,000 feet; one

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Testimony of Morton Stein
Direct Examination of Estes

(p. 1141) Q. All right. And what did they vote?

A. They voted to disapprove it.

Q. All right, sir. Now, did Mr. Patterson or anyone on his behalf ever request any variances in order to get this particular plan approved?

A. No, sir. Not officially or any other way I know of. Our regulations in 1980 specifically required that if a variance is required or is requested, I'm sorry, that it be produced in writing and also as a provision in our regulation that if a variance is required or requested, that we give notification to people who live in a surrounding area

so they can come to a public hearing so that they will know that a variance is being requested.

Q. All right, sir.

A. And it may be — and that it may be granted. That's one of the reasons we request it in writing so we can give people — notice to people that live in the surrounding area.

Q. Is that requirement, I mean, was that requirement put into your regulations after public notice and fair hearing and so forth?

A. Yes, sir. In 6, 1980.

Q. Now, going back and just summarizing, did (p. 1142) the plan submitted in October 1980 —

MR. NEBEL: Your Honor, I'm going to object to his summarizing on his witness since he objected —

MR. ESTES: Probably a bad choice of words.

THE COURT: Okay. I understand.

BY MR. ESTES:

Q. What I'm trying to ask you is whether — and don't answer until the judge rules on it — is whether the plan submitted in October 1980 met either the '73 regulations or the regulations that were in existence in October of 1980.

MR. NEBEL: Your Honor, I didn't hear that question. Met any of the '73 or '77 —

MR. ESTES: Whether it met the '73 or the '80 regulations. Not any, but whether.

THE COURT: Whether it met the '73 regulations is one question.

MR. ESTES: That's right. It's two questions, I'm sorry.

THE COURT: Just ask him the two questions.

BY MR. ESTES:

Q. Did this plan submitted in October 1980 to (p.1143) the Planning Commission meet all the regulations that were in effect in 1973?

A. No, sir.

Q. All right. Did it meet all the regulations that were in effect in 1980?

A. No, sir.

MR. ESTES: All right. If it hasn't been admitted, I'd like to get No. 262 admitted at this time, Your Honor.

THE COURT: All right.

BY MR. ESTES:

Q. I've handed you what's been marked as Defendant's Exhibit No. 104, which is the minutes of the meeting of the Planning Commission of November 6, 1980; is that correct?

A. That's correct, sir.

Q. All right, sir. What does that reflect with regard to the bond that we've been hearing talk about today, the \$90,000 bond?

A. On Section IV, considered performance bond of subdivision. Mr. Stein reported there has been no sub-

stantial progress since the bond was extended in April of '80. There has been no paving other than what had been done before April when the bond was extended. They had been through three paving

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1169) BY MR. ESTES:

Q. All right, sir. Now, what is the bottom figure you just got total there?

A. 547.75.

Q. What does that represent?

A. The total allowable units.

Q. Dwelling units?

A. Dwelling units.

Q. That's under which regulation?

A. 1977.

Q. All right, sir. And those regulations were amended in 1977. You provide for that; is that right?

A. Yes, sir.

Q. Was this or not during the gap in approval of the preliminary plat?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. All right, sir.

A. It was in—yes, sir.

Q. All right, sir. Now what would the 1977 amendments, what effect, if any, would the 1977 amendments have on that calculation of the maximum density that could be put in the Temple Hills

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1173) Q. All right. Any other areas? How about down in here?

A. Down in here, which would be the extension of these areas right in here. I think I—okay, I didn't show that. Right in here.

Q. Those are all areas with the slopes greater than 25 percent that they are showing lots on?

A. Right.

Q. All right. Now, does that comply with the regulations that were in effect in October 1980 and June 1981?

A. No.

Q. Does it comply with the regulations that were in effect in 1973?

A. No.

Q. All right, sir.

Now, what's the next reason given for turning down those two plats?

A. Temple Road is the main access road for the development and cannot handle the traffic generated for the proposed development because of the condition of the road. Temple Road was a part of the subdivision.

Q. How did it become a part of the

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1204) Q. Okay. And when did he obtain his—under the new procedure, when did he obtain vested rights not to have anything changed?

A. On the preliminary plat he obtained it when he got preliminary approval for a 2-year period. It specifically said it would be good for two years and when it was renewed it would be renewed under new regulations.

Q. All right.

A. And then—but he—he obtained his vested rights in terms of not changing anything when his final plat—really, at the same time.

Q. Same time as under the old procedure?

A. Right. The final plat.

Q. All right. Let me ask you a couple of other things right quick. On zoning ordinances, who has the power to grant variances on zoning ordinances, in other words, does the Williamson County Planning Commission have the power to grant a variance as to a zoning requirement?

A. No, sir.

Q. Who does?

A. The Board of Zoning Appeals in certain instances.

Q. What about the County Commission?

(p. 1205) A. The County Commission can change the regulations.

Q. All right. What about the subdivision regulations? Who can grant a variance on subdivision regulations?

A. The Planning Commission.

Q. What, if anything, is required before they will grant one? As far as the developer, what do they require the developer to do?

A. He put it in writing, and also a public notice, we require a public notice be presented, be a public notification of people living in the surrounding areas that a variance is required.

MR. ESTES: Just one moment.

Would Your Honor wish to take a recess at this time?

THE COURT: All right. Why don't we take a break at this time.

(Brief recess)

THE COURT: Are we ready to proceed?

MR. ESTES: Yes, sir.

THE COURT: Okay. Let's bring the jury in.

(The jury entered the courtroom.)

BY MR. ESTES:

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Testimony of Morton Stein
Redirect Examination by Estes

(p. 1386) Q. When did the developers of Temple Hills first submit the topographical map?

A. To my knowledge, the first time I saw it was sometime in the—seemed like it was in winter or spring of 1980 after we had asked to have that committee started.

Q. All right, sir. Now, when was the first time that the Planning Commission had an opportunity to really try to determine the slopes out there, the road slopes and so forth?

A. At this time.

Q. Why?

A. Because the map that was originally handed that we had before us, the preliminary plat had 20-foot contours relatively faded; it was difficult to read and difficult to determine.

Q. What did this topographical map submitted in the spring of 1980 have on it that differed from the ones that had been submitted before?

A. It had two-foot contours on it. It was to a scale of one to 100 while this one was a scale of 1 to 200.

Q. Does that make it easier to determine slope?

A. Yes, sir. Much easier.

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Testimony of Thayer Martin
Redirect Examination by Estes

(p. 1570) dwelling units left for Hamilton according to the density formula.

And to give us some idea of the ratio, the mix, single and the clusters were the five detached units per acre, we've got—X is the number of— all right. Yes. X is the number of dwelling units on the lots, on the single-family lots. Y is the number of units on the—

Q. Number of lots?

A. Number of units on the lot in the cluster. So you add those two up and they got to be equal to—for '73, 311. The same type of situation going on over here, and I won't repeat as far as 1980. X plus Y is equal to 285 over here. X plus Y is equal to 311. X plus two-and-a-half Y is equal to 326. This equation gives you the number of dwelling units that are on here. This is the number of lots.

All right. By algebra, when you make this equation solveable for Y, you bring the X over here, you get 311 minus X, and you substitute into this equation this equation here, you come up with an equation 311 minus Y plus two-and-a-half Y is equal to 326. Then you subtract all this out, and you work up one-and-a-half Y is equal to 15. Y then is

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Testimony of Wilburn Kelly
Direct Examination by Estes

(p. 1594) Do they have more than one or only one?

A. No. They have many functions. They pass subdivision regulations, they just completed a comprehensive county development plan, they did a water study earlier, they did a flood study. Now, usually, they will hire a consultant to assist them with studies such as the flood study and the water study, and all their functions cover a very wide area.

They are—I would actually say that they serve as the legislative branch of the Planning Commission. They make the rules and regulations.

Q. All right. They make the subdivision regulations?

A. Yes, sir. Subdivision regulations. They also make recommendations on planning. I mean, on zoning. I believe the law provides that all zoning changes must come through the Planning Commission for request, but the County Commission being the governing body can accept their recommendation or decline to accept their recommendation.

Q. All right. So the body that actually has the final say-so as to passing, say, an amendment or even an original zoning ordinance is the County Commission and not the Planning Commission; is that (p. 1595) right?

A. It is the County Commission.

Q. But as far as subdivision regulations are concerned the Planning Commission considers those and votes on them and enacts those into laws or rules, whatever you want to call it; is that right?

A. That's exactly correct.

Q. Now, what, if anything else, do Planning Commission members do in their service?

A. Well, they work closely with the three city planning commissions, even though they do not have planning jurisdiction for those three areas, the three cities are part of the County, and it's certainly good to coordinate and work with those groups.

Q. All right. What about with respect to submission of plats by developers, do they have any duties with respect to that?

A. Oh, yes, sir. They have to review all plats and either after listening to the staff, the developer, and the chairman always permits—well, maybe I shouldn't say always, but in most cases always lets the audience speak on all items that come before the Planning Commission, so after listening to the citizens, the developer, and the

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Testimony of Ann Peterson
Direct Examination by Estes

(p. 1704) and Sections 4 and 5 have gone through three paving seasons with only partial paving.

Then there are inadequate services to provide fire protection for multi-family units and the lots do not meet the minimum size, which is one-half acre, and road frontage 125 feet of our subdivision regulations.

Q. All right. Now, I believe the staff made some recommendations as you mentioned earlier to try to work with Mr. Patterson to, you said, see if you could come to some kind of an agreement?

A. That is right. We spent a lot of our time once we got to the place where we had some of the basic information, which was, for example, how many acres there were actually out there, which was disputed, and it took a while to even get a survey of all that.

Q. All right. Prior to 1980 had they ever shown to the Planning Commission in any official form such as something on the plat that the Natchez Trace take had been taken out of there?

A. Not to my knowledge. So—but after we kind of got the basics and saw how much acreage there really was there and how it was divided into land that already had a final plat on it, which (p. 1705) means they could sell lots or the other part that was still to be developed, then once we did that, then we went through the—just to see, for instance, what the roads would be like if we—if the houses were arranged in a certain way, and that was part of the problem, that the—some of the acreage out there is very steep. In fact, I see over here they said 25 percent grades that's nonbuildable land. It was that part made it not acceptable for building lots.

Another thing was that whenever the Natchez Trace purchase was taken out, then it was very difficult to get roads up into there, and the reason for having the requirement on the length of a one-way—I mean, a dead-end street is that if something happened and that got cut off, then there would be no other alternative way for the people to get out, so there were a lot of things that we looked at. We were really just hoping that there would be some way that these things could be put into the number that

was being talked about or any of the numbers that were being talked about. But we did not get any—let's see.

We did get some possible configurations of where to put the lots, but whenever we did that, (p. 1706) the road grades were, you know, I don't remember a number, but well in excess of 10 percent.

Q. All right. And did the developer ever offer any kind of a concession at all after as to his position?

A. I would say no. Sometimes Mr. Ragsdale would say Mr. Patterson might do something, but then he always said, "I cannot speak for him," and never was there any concession offered to us.

Q. All right. Mrs. Peterson, was there ever any occasion when you were working with Mr. Ragsdale when he asked you to have anything other than a public meeting?

A. Yes. On one occasion when the committee, the small committee studying Temple Hills was meeting, in fact, I would have to say it was probably Mr. Patterson who requested it, but I really don't remember that. It's been sometime ago.

Q. Do you know for certain though whether it was one or the other?

A. It was two of them, yes. Yes, very definitely.

Q. All right.

A. And they said that they did not want to meet if some members of the public could be there,

• • •

Testimony of Suzanne Stewart
Direct Examination by Estes

(p. 1874) Q. Would you reach forward and pull that microphone a little closer to your mouth? I can't hear you that well.

All right. Now, I want you to skip on over, and we are skipping some areas in this, but I want to call your attention under Article 1, definitions, paragraph No. 2.

THE COURT: What page are you on?

MR. ESTES: That's the second page, Your Honor.

THE WITNESS: Do you want me to read it?

BY MR. ESTES:

Q. Read paragraph No. 2, yes.

A. "Common areas shall mean and refer to any and all real property owned by the Association, or such other property to which the Association may hold legal title, whether in fee or for term of years, for the prior and superior, but nonexclusive, use, benefit and enjoyment of the members of the Association, subject to the provisions of this Declaration, together with those areas shown reserved for the golf course, tennis courts, clubhouse, and supporting grounds, and facilities located at or near the clubhouse, including the (p. 1875) swimming pool, title to which shall be vested in Temple Hills County Club, and the use of which shall be available on a membership basis. Common areas with respect to the properties made subject to this Declaration, whether at the time of filing of this Declaration or subsequently by Supplementary Declarations shall be shown on the plats of Temple Hills

County Club Estates and designated thereon as common areas or common open space."

Q. All right. I want to call your attention to paragraph numbered 6 and ask you to read that.

A. "Properties shall mean and refer to any and all of that certain real property now or which may hereafter be brought within that certain residential subdivision being developed by developer in Williamson County, Tennessee, which subdivision is and shall be commonly known as Temple Hills County Club Estates."

MR. ESTES: All right.

Just a moment, if the Court please.

BY MR. ESTES:

Q. Now, you got a document like this out of the public records, did you not?

A. Yes.

(p. 1876) Q. And did you also obtain a copy of that document from some other source?

A. Yes. These covenants were passed out to the homeowners at the homeowners' meeting in March of '79.

Q. By whom?

A. Mr. Tom Ragsdale was conducting the meeting for Mr. Jim Patterson, the developer.

Q. What, if anything else, did Mr. Ragsdale give you at that meeting?

A. He gave us some amendments to the covenants.

Q. All right. Anything else?

A. Some bylaws to the—for a Homeowners' Association and a charter for the formation of a Homeowners' Association.

Q. All right. Now, I refer you to that charter. Do you have a copy of that?

A. I think so.

Q. I may have it here. I'm sorry. Just a moment. I've got so many papers, it's hard to separate them all. Let's pass this to the witness. I think it's got it attached. It's a copy of the whole thing. Take a look at that, Ms. Stewart, and see if the charter is attached to that.

(p. 1877) A. No. I believe the charter is a separate piece.

Q. Pardon?

A. The charter is a separate document.

Q. All right. Well, let me just hand you a charter, hand you a copy of the charter and ask you if the purpose or purposes of the charter and the corporation are stated therein in, I believe, paragraph 5.

A. There are three purposes to the charter as we were to form. First was to maintain those areas designated as common areas within the residential subdivision of Williamson County, Tennessee, known as Temple Hills Country Club Estates, as such common areas are defined in the Restrictive Covenants of Temple Hills Country Club Estates of record book 210, page 64, Register's Office of Williamson County, Tennessee as amended, and as such common areas are from time to time designated upon reported plans of Temple Hills Country Club Estates.

Q. That's the stated purposes, right?

A. Uh-huh.

Q. That charter you just read from refers to the restrictive covenants "as amended," do they not?

(p. 1878) A. Yes, it does.

Q. All right. Did Mr. Ragsdale give you any amendments to the Restrictive Covenants?

A. Yes. He gave us three amendments with that presentation.

Q. All right. Rather than going into any details, those are the ones contained at what book and page number?

A. Book 219, page 274.

Q. Dated what date?

A. December 28 of '73.

Q. All right.

A. Book 298, page 225 dated October 24, '77, and book 298, page 223, October 26 of '77.

Q. Is that all the amendments he gave you?

A. That's all that he gave us.

Q. All right. And your research of the public records at the Williamson County Register's Office, did you locate any other amendments to the Restrictive Covenants at Temple Hills?

A. Yes. I did.

Q. And do you have the book and page number where that amendment was?

A. I believe it's 292, page 430.

MR. ESTES: Right. I believe that's (p. 1879) the one I haven't handed you yet, too, isn't it?

Just a moment. Your Honor, this is Defendant's Exhibit No. 127.

BY MR. ESTES:

Q. All right. What's the date of that amendment, please, ma'am?

A. 11th of August, 1977.

Q. All right. I want to refer you to paragraph numbered 1 in that. What does it provide for?

A. It's "Properties be amended by deleting therefrom the period at the end and by adding thereto the following phrase: provided, however, properties shall not meet and refer to any real property not included in this legal description."

Q. That's an amendment to what? Article I of the definitions on paragraph 6 of the Restrictive Covenants; is that correct?

A. Yes.

Q. All right. You have that restrictive covenant there before you, don't you?

A. Yes. I do.

Q. All right. Turn to Article 1, paragraph 6. Are you there?

A. Yes.

(p. 1880) Q. All right. Now, that is the paragraph that you read a few moments ago, is it not?

A. No. But it refers to properties.

Q. All right. You didn't read that. I didn't have you read that. Okay. Read that as it appears in the original restrictive covenants, paragraph 6 of Article 1.

A. Property shall mean and refer to any and all of that certain real property now or which may hereafter be brought within the certain residential subdivision being developed by developer in Williamson County, Tennessee which subdivision is and shall be commonly known as Temple Hills Country Club Estates.

Q. That's the original, right? What did the amendment add to it, and don't give an interpretation, just tell me the words that the amendment added to it.

A. "Provided, however, property shall not mean and refer to any real property not included in the legal description attached hereto."

Q. And was the legal description attached to the original—

A. Yes.

Q. —restrictive covenants?

(p. 1881) A. It's at the back.

Q. Which is Exhibit No. 125, right?

— All right. And turn to that, if you would, please. I'm not going to ask her to read the legal description, Your Honor. It's long and involved, but I do want to ask you—I'll wait until you get to it. If it will help you, it's at page 95, if you look at the book 110 and look at the page numbers. Flip over to page 95. That will help you find it.

THE COURT: Let me have the attorneys approach the bench just a minute.

(Off the record discussion)

BY MR. ESTES:

Q. Ma'am, did you find the legal description?

A. Yes. I did.

Q. Just read the number of acreage contained in each tract within that legal description. It would be the last thing.

A. Tract 1 is 219.57 acres, tract 2 is 303.71 acres, and tract 3 is 138.80 acres.

Q. All right.

Now, going back to that amendment, that 292430—

A. Uh-huh.

(p. 1882) Q. —paragraph 3, what does it provide?

A. This is the article on common area property rights be amended by deleting therefrom the first numbered paragraph of Section 1 which provides the right of the association to limit the use of the common area to owners, their families, and guests, and substituting in lieu thereof the right of the association to limit the use of the common area to which it may hold legal title to owners, their families, and guests, it being understood, however, that the use of those common areas, title to which is vested in Temple Hills Country Club, shall be limited to the membership of the Temple Hills Country Club and those authorized by the Temple Hills Country Club to use same.

Q. Now, did you further research the records at the Register's Office in Williamson County, Tennessee to de-

termine what, if any, common areas "to which the association may hold legal title"?

A. Yes. I did, and, in fact, I spent about a year researching it and found no common area for the homeowners at all.

MR. NEBEL: Objection, Your Honor. That's just exactly—

THE COURT: I think what her (p. 1883) testimony, and I'll instruct the jury, her testimony is that in her search she did not find any. That does not mean no common area, but in her search she did not find title to it.

MR. ESTES: Exactly. All right.

BY MR. ESTES:

Q. Now, paragraph 4 of that amendment that has just been referred to, what does it provide?

A. "Article IV, Section 4, paragraph 1, be amended by deleting therefrom the following, which provides: Recreational facilities, the primary purpose of which is to serve the residents of Temple Hills Country Club Estates.

"And substituting in lieu thereof recreational facilities serving the residents of Temple Hills Country Club Estates and the membership of Temple Hills Country Club."

Q. All right. And paragraph 5 of that amendment, only Section Two thereunder.

A. "Ownership of country club. The right to manage and operate the club, including, without limitation, the golf course, fairways, buildings, swimming pools, tennis courts, and other recreational facilities the club may provide, shall be exclusively in the club, which shall own the (p. 1884)

lands designated for the golf course, tennis courts, clubhouse and related facilities, including the swimming pool and parking area, on the recorded plat. All dues and charges shall inure to the benefit of the club which shall bear all losses and be entitled to all profits. No member subject to assessment beyond fixed monthly dues. Further, no member, by reason of his membership, and no lot owner shall have any proprietary interest in any of the assets of the club. In turn, the obligation of the club members to pay dues shall be and remain personal obligations of such members and shall not constitute a lien upon the lot of any member, who may be a lot owner, nor pass to his successor in title."

MR. ESTES: All right. Your Honor, I would move that those documents be entered as evidence.

THE COURT: All right.

MR. ESTES: The ones that haven't already been.

MR. NEBEL: Your Honor, may we approach the bench?

THE COURT: All right.

(Whereupon, the following discussion (p. 1885) was held at the bench:

MR. NEBEL: Your Honor, evidently where they are going is, we're having another brand new objection raised to our plat, a lack of ownership of the common space. They have argued about the use as an objection, use of the common area, and they said you've got to provide others like recreational facilities for all the children, Judge Kelley talked about yesterday, but they've never told you that we're not going to approve because you do not own, and

I think they're judicially estopped from coming and changing their story and arguing about the ownership of the common space, and that relates back to June 18 and what we were doing then, rejecting, because you don't own any common area.

MR. ESTES: What we're showing is taking any and all control whatsoever of lots out there in Temple Hills over any common area, and that is one of the things, one of the very objections made. That's one of the eight reasons. They didn't list that on their summary, but if you go back to those eight reasons it's contained right in there.

MR. NEBEL: Your Honor, I wish you (p. 1886) would please go back and read those eight reasons. I think it talked about recreational facilities.

THE COURT: I'll let him get this in the record. I'll let him get those documents, we'll have an opportunity to go back before argument. These documents by themselves don't mean anything to the jury. It's the interpretation of them, and we can argue about the interpretation of the documents.

MR. BAILEY: And we want to be able to.)

(The proceedings resumed before the jury.)

MR. ESTES: I'd like to have the witness handed what has already been entered into evidence as Exhibit No. 105.

BY MR. ESTES:

Q. Ma'am, can you identify that?

Look through it and I'm going to refer you over to the last page, the attachment.

A. Yes. Looks like the minutes to the May 7 meeting of the Planning Commission and—

Q. Attached to it is what?

A. Resume of planning problems which—

Q. All right. Let's don't get into all the (p. 1887) attachments. Go on over to the last one, which is the only one I want to refer you to. All right. What is that? Identify that.

A. This is a map of Temple Hills, artistic rendition of Temple Hills as was shown to buyers when they purchased the homes.

Q. All right. That is a Xerox copy, is it not?

A. Yes.

Q. Did you have the original of that?

A. Yes. I do.

MR. ESTES: All right. Your Honor, I'd move that the original of that be substituted and entered as the next defendants' exhibit in lieu of the Xerox copy. We discovered the Xerox copy was the only thing that was attached to the other exhibit, and I want to get the original in.

MR. NEBEL: Without arguing in the presence of the jury, I fail to see the relevance of it in line with the Court's earlier ruling.

THE COURT: If he's just substituting one piece of paper for an identical one—

MR. ESTES: It's the original which is colored and so forth. The Xerox copy didn't pick up the coloring, so I want the original in.

• • •

Testimony of Morton Stein
Direct Examination by Estes

(p. 1889) the Planning Commission. This relates to that.

MORTON H. STEIN

was called as a witness on behalf of the Defendants and, having been previously sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. ESTES:

Q. Mr. Stein, I handed you Exhibit No. 127, which is one of the amendments, is it not, to the Temple Hills Estates—

A. Yes.

Q. —Restrictive Covenants?

A. Yes, sir.

Q. As keeper of the records, has that document ever come before the Planning Commission for consideration or approval?

A. No, sir.

MR. ESTES: That's all.

CROSS-EXAMINATION

QUESTIONS BY MR. NEBEL:

Q. Mr. Stein, you weren't county planner until April of 1979?

• • •

DEC 10 1984

ALEXANDER L. STEVAS.

CLERK

No. 84-4

In The
Supreme Court of the United States
October Term, 1984

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al,

Petitioner,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOINT APPENDIX

Volume II, Pages 237 to 421

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PETITION FOR CERTIORARI FILED JULY 2, 1984
CERTIORARI GRANTED OCTOBER 1, 1984

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VOLUME II
PLAINTIFF'S EXHIBIT 1009
MINUTES OF MEETING OF
WILLIAMSON COUNTY PLANNING COMMISSION
February 1, 1973

The regular meeting of the Williamson County Planning Commission was held at the Court House in Franklin, Tennessee, on February 1, 1973, at 7:30 o'clock P. M. Present were: Robert Moran, Chairman, Claude Callicott, Secretary, John Moran, T. Vance Little, Jim Crowell, Robert M. Collier, Harry L. Sanders and Larry L. Westbrook. Absent were: Stirton Oman and John Thomas Helm. Also present were: Mr. Joe Bowman, County Building Commissioner, Mr. Henry Denmark Bell, County Attorney, Mr. Michael J. Cody, representative of the State Planning Commission, and Mr. Robert Martin, also a representative of the State Planning Commission who, the Commission was advised by Mr. Cody, would be the staff representative from the State Planning Commission assigned to work with the Williamson County Planning Commission.

Mr. and Mrs. Frederick Hughes presented their request to have the plat of Grasslands Estates Section 2 voided. These parties asserted that they were the owners of a recorded easement, that the Union Trust Company had platted the area and had the same recorded, that it had constructed roads across the easement, said roads now being public roads, and that this interfered with the use of the Hughes easement. This matter had been

before the Commission on at least one previous occasion for general discussion. It appeared that one or more lawsuits had been filed involving the controversy between the Hughes and Union Trust Company, that the Honorable John Henderson, Chancellor, had already decided one or more of these lawsuits, that an additional lawsuit was pending. The Commissioners were of the unanimous . . .

. . . located just off Highway 96 near its interchange with I-40 so that they could operate a camp ground on same to be known as Safari Camp Ground. It appeared that the Starks property did not actually front on a public road, that they did have an easement approximately 30 feet wide extending from Highway 96 back to the property in question. The Commission was of the unanimous opinion that it should not recommend the change of zoning desired unless the Starks could in some manner arrange for a road at least 50 feet wide, to be dedicated to the public, extending from Highway 96 back to their property. Mr. and Mrs. Starks were so advised of the Commission's opinion.

The owners of a subdivision entitled Sunny Side Estates Section 2 through their engineering firm, James L. Murphy, Jr. & Company, presented for approval a final revised plat of said Section 2. The final plat of Section 2 had been signed by the Secretary on August 29, 1972, and presumably was recorded shortly thereafter. The Engineer stated that it had been determined that a very small number of revisions were necessary and that these revisions could possibly be made by filing a revised plat. He stated further that the revised plat presented had been signed by all property owners involved. Mr. John Moran then moved to approve said revised plat of Sunny Side

Estates, Section 2. This motion was seconded by Mr. Crowell and was passed by unanimous vote.

The Commission next considered an initial sketch of Temple Hills Country Club Estates, the same being designated on the plat submitted as a "preliminary land plan". This was submitted under the recently adopted regulations for Residential Cluster Developments. This initial sketch shows the total number of acres to be 550 and showed 508 living units. It provided that all lots were to be served by sanitary sewers, that all lots would have a minimum frontage of 115 feet on a public road and contain approximately 18000 square feet, that the minimum building setback line would be 100 feet for lots fronting on Temple Road and Union Bridge Road and would be 40 feet on the other streets in said subdivision. Mr. Callicott called attention to the provisions of said regulation respecting density and stated that, while he had not put a scale to the plat, he was of the definite opinion that the plat did not comply with the density provisions of the regulations but in fact authorized the construction of a substantial number of building units more than were permitted under the regulations. A rather heated but amiable controversy then arose between the Chairman of the Commission and the Secretary (this controversy being marked, however by the utmost decorum and a total lack of violence) as to just how many building units could be constructed under the regulation on a given tract of land. The Secretary, Mr. Callicott, stated that to him the regulation was perfectly clear and that, except where a flood plain or a grade in excess of 25% was involved, no more living units could be constructed on a given tract of land under the Cluster

Development than could be constructed on the same tract of land under the regulation providing for conventional subdivisions. He cited for example a tract of land containing 600 acres and zoned so that the minimum lot size would be one acre. He stated that, under the regulation providing for the conventional subdivision, 600 building units could not be lawfully constructed because a subdivision had to have roads and that the number of units on lots on one acre if they should be constructed on a 600 acre tract of land would not be 600 but would be 600 less the number of acres consumed by roads. He stated further that the number of acres consumed by roads in such conventional subdivision under the regulations pertaining to same would be quite substantial and that the number of building units thus permitted would be substantially less than 600. It was his view that it should first be determined how many building units could be lawfully constructed on such 600 acre tract of land under the regulation pertaining to conventional subdivisions and that that number would be the maximum number permitted under the regulation pertaining to Residential Cluster Developments.

However, the Chairman, Mr. Robert Moran, stated that it was just as clear to him that in a Cluster Development a greater number of units could be lawfully constructed on a given tract of land than could be lawfully constructed on the same tract of land if developed under the provision relating to conventional subdivisions and that the maximum number of units that could be constructed in a Cluster Development would be determined by dividing the total area by the minimum required area for each lot in a conventional subdivision, disregarding the

necessity for roads. Under his view, if a given tract of land embraced 1,000 acres and the property was so zoned as to require a minimum of one acre for each lot, 1,000 living units could be constructed on said tract under the Cluster Development zoning regulation notwithstanding the fact that, if developed under regulation pertaining to conventional subdivisions, the number of units would be substantially less than 1,000.

After an extended discussion of said plat, Mr. Westbrook moved that the initial sketch be approved. The motion was seconded by Mr. John Moran and was passed by a majority vote, all members of the Commission voting for the motion except for Mr. Callicott, who voted "no".

The next item of business considered was a plat of a subdivision entitled Mooreland Estates, this being presented by Mr. Tyler Berry, Attorney, and by Mr. Harold Morris, Engineer. Mr. Berry stated that a portion of this proposed subdivision was in the City of Brentwood and that another portion was in the Eighth Civil District of . . .

. . . the building units fronted on open spaces rather extensive in scope and that this initial sketch was in stark contrast to the initial sketch of Temple Hills Country Club Estates in that the Temple Hills Country Club Estates sketch showed several streets with long rows of houses, one after another, with access only to the street on which the houses fronted and not on open spaces at all. After full consideration, Mr. Little moved that the initial sketch of Cottonwood Estates be approved. This motion was seconded by Mr. Collier and was passed by unanimous vote.

There being no further business, the meeting adjourned.

Robert Moran, Chairman

Claude Callicott, Secretary

PLAINTIFF'S EXHIBIT 1012

MINUTES OF MEETING OF

WILLIAMSON COUNTY PLANNING COMMISSION

May 3, 1973

The regular semi-monthly meeting of the Williamson County Planning Commission was held at the Court House in Franklin, Tennessee, on May 3, 1973, at 7:30 o'clock P.M. Present were: Robert Moran, Chairman, Claude Callicott, Secretary, Robert M. Collier, John Moran, Harry L. Sanders, Larry L. Westbrook, John Thomas Helm, T. Vance Little and Stirton Oman. Absent was Jim Crowell. Also present were Staff Representative Robert Martin and his associate, David Holderfield. Also in attendance were the County Attorney, Henry Denmark Bell, and the County Building Commissioner, Joe Bowman.

The first item of business was the election of officers. The Chairman, Robert Moran, asked Harry Sanders to preside during the election of officers and by unanimous consent Mr. Sanders did so.

Mr. John Moran placed in nomination for the office of Chairman T. Vance Little. There were no other nom-

inations and John Moran then moved the election of T. Vance Little as Chairman. This motion was seconded by Mr. Helm and several others and was carried by unanimous vote.

Thereupon Mr. Little assumed his duties as Chairman of the Commission.

Mr. Collier then nominated for the position of Vice-Chairman Harry L. Sanders and moved the election of Mr. Sanders as Vice-Chairman. There were no other nominations. The motion was seconded by Mr. Robert Moran and also by Mr. Westbrook and was passed by unanimous vote.

Mr. Robert Moran then nominated for re-election to the position of Secretary Claude Callicott and moved his election as Secretary. This motion was seconded by Mr. Sanders and was passed by unanimous vote.

The next item of business was consideration of the request of the developers of Sunny Side Estates, Section 2, for partial release of the funds in their savings account in Home Federal Savings & Loan Association which secure their completion bond. This completion bond in the amount of \$70,000.00 was executed by Edward J. Morgan, Robert E. Young and Richard D. Tayler and was secured by savings account in Home Federal Savings & Loan Association in the amount of \$70,000.00. The Secretary stated that he had received from Barge, Waggoner, Sumner & Cannon, Engineers, letter stating in substance that the construction work for the installation of water mains and facilities was approximately two-thirds (2/3) completed and the Secretary further stated that a substantial amount

of the construction work on the roads in the subdivision had also been performed. The request of the developers was that the bond be partially reduced and in such manner that payment would be made directly from said savings account to Chrisman Excavating & Grading (Luther A. Chrisman). Mr. John Moran then moved that the request of the developers (principals on said bond) for a partial release of the funds in said bank account for payment directly to the contractor, Chrisman Excavating & Grading (Luther A. Chrisman), the amount of the funds to be released to be determined by the Secretary and to be based upon information in his possession and to be substantially in proportion to the amount of the construction work already performed on the construction of the roads and the installation of the water mains and facilities. This motion was seconded by Mr. Collier and passed by unanimous vote.

The Commission next considered the request of Mr. Martin Zeilin, Jr., presented personally by him and by his engineer, Mr. Michael Anderson, affiliated with James L. Murphy, Jr., & Co., to approve a revised initial sketch of proposed Cluster Development known as Cottonwood Estates. Mr. Robert Martin stated that he had examined this revised initial sketch and found it satisfactory. Accordingly Mr. Sanders moved to approve same. The motion was seconded by Mr. Robert Moran and passed by unanimous vote.

Mr. Zeitlin and his Engineer then presented for approval final plat of said Cluster Development known as Cottonwood Estates. They asked for such approval but conceded that several details would have to be worked out

and they were hoping that the Commission would give final approval subject to any reasonable conditions that the Commission might impose. The Secretary stated that he had been furnished a copy of the legal instruments proposed to be used by the developers including Declaration of Covenants and Restrictions and that, while they were splendidly drawn instruments, he did feel that they should be strengthened by adding to same such provisions as would beyond question preserve all open spaces permanently. He stated that he felt he could write such additional paragraphs as would be satisfactory to the Commission and to the County Attorney and also to the developers. Mr. Robert Moran then moved that the final plat be approved subject to all certificates being signed, proper bond being executed and subject to the addition to said legal documents of such provisions as would protect the rights of the county and preserve open spaces permanently as suggested by the Secretary. After considerable discussion the consensus of opinion was that, in view of the several conditions that would have to be complied with, the matter should be postponed. Accordingly, Mr. Robert Moran then withdrew his motion. Mr. Helm moved that the plat not be approved until it was in all respects complete. This motion was seconded by Mr. Westbrook and passed by unanimous vote.

Chairman seemed to be of the view that there was a need for some commercial development in the area in question. Mr. Helm expressed opposition, some of the other members appeared to be for the rezoning. The Secretary noted that he was still opposed to the request, stating that the Commission had on several occasions in recent years for the most part consistently rejected individual applications for spot zoning. Mr.

John Moran expressed the opinion that a 6 acre tract did not constitute spot zoning. It appeared that there were substantially as many opinions as there were members of the Commission, a reflection of the independence of each and every member of the Commission. Mr. Helm then moved to reject the request for rezoning. The motion was seconded by Mr. Westbrook. Said motion failed, receiving three affirmative votes and four negative votes. Mr. Collier then moved to approve the request but after further discussion Mr. Robert Moran moved to postpone any action until the June meeting so that in the meantime sufficient investigation can be made as to all the facts, particularly for determination as to whether additional property in the area should be rezoned if the Commission should decide to grant the request of Mr. Bowers in whole or in part. This motion was seconded by Mr. Oman and was passed by unanimous vote.

There was next presented to the Commission final plat of Harpeth River Estates, Section 2. This plat had been examined by Mr. Martin who recommended approval and said final plat was approved subject to bond, on motion of Mr. Collier seconded by Mr. John Moran and unanimously passed.

Mr. Lytle Brown, Engineer for the owners and developers of Temple Hills County Club Estates, a Cluster Development, presented for approval of the Commission a revised initial sketch of said development. Mr. Brown stated that he had met on several occasions with representatives of objecting residents of the area and several significant changes had been made in the plat as originally presented. These changes were explained by him and by Mr. Robert Martin and Mr. Martin expressed approval

of the sketch. Mr. Brown stated that some reduction in the number of lots had been made but conceded that there was still a violation of the density provisions of the regulations as construed by the Secretary but no violation as said regulations had been construed by Mr. Robert Moran, and no violation as construed by a formula which had been submitted by Mr. Vance Little.

Mr. Callicott commended Mr. Lytle Brown for the significant improvement in the plat. Mr. Robert Moran also expressed pleasure that the plat had been vastly improved and noted that the people in the immediate vicinity of the development were apparently reasonably well satisfied with what had been worked out. Mr. Robert Moran then moved to approve said revised initial sketch. The motion was seconded by Mr. John Moran and was passed by unanimous vote except for two abstentions, those abstainers being Mr. Westbrook and Mr. Callicott.

There was next presented for approval revised preliminary plat of Royal Oaks, Section 4. Mr. Callicott objected to this plat on the ground that the homes along Liberty Pike did not front on the pike but on the contrary the rear ends or back yards of said lots fronted on the pike. Mr. Martin stated that this situation did present a question and he suggested that this particular problem might be alleviated by a requirement for landscaping on the lots along the pike. The developers were present, Mr. J. B. Downey, Mr. R. C. Adams and Mr. Wilson Herbert, and they stated that they felt the objection was not serious because the lots lying along Liberty Pike were several feet lower than the level of the pike and any houses that might later be constructed on the opposite side of the pike.

These developers stated that they were willing to insert in their restrictions to be recorded covenants that there would be no ingress and egress to and from said lots from the Commission was holding three bonds on three different sections of his subdivision, the amount of one bond being \$45,000.00, and that he wished to have all three sections placed under one bond in the amount of \$45,000.00. The Secretary stated that he was holding as security on the bonds in question a \$2,500.00 certificate of deposit on section 1, a certificate of deposit for \$7,500.00 on section 3, and a letter of credit in the amount of \$45,000.00 on section 4. He stated that, if the Commission so authorized, a new completion bond could be executed in the amount of \$45,000.00 in such manner as to insure the completion of the roads, water mains, etc., in all three sections of said subdivision so as to release the \$7,500.00 certificate of deposit and the \$2,500.00 certificate of deposit. It appeared to the Commission that the work had progressed to such extent that the request of Mr. Maddox should be granted. Mr. Sanders then moved that the total amount of the bonds for said three sections be reduced from \$55,000.00 to \$45,000.00, that a new bond be executed in the amount of \$45,000.00 to cover the three sections, secured by the \$45,000.00 letter of credit and that the two certificates of deposit, \$7,500.00 and \$2,500.00, be released and surrendered to Mr. Maddox. The motion was seconded by Mr. John Moran and passed by unanimous vote.

Mr. Hal Herd appeared in person before the Commission and stated that he desired to cure hams on his farm, and that he would cure only those hams which were produced from hogs grown on his farm, and he wanted such action taken by the Commission as would assure him

that he could lawfully conduct said operation under existing regulations or would result in such rezoning as might be necessary so as to permit such operation. The Secretary stated that in his opinion it was not the duty or province of the Commission to give an advisory opinion as to whether the desired operation could be lawfully carried on under existing zoning regulations since the Commission was not an enforcing agency; that the County Building Commissioner was the enforcing agency and that if Mr. Herd desired a building permit he should make application to Mr. Bowman and it would be Mr. Bowman who would have to make the initial decision as to the lawfulness of the proposed use or operation, that Mr. Bowman could call upon the County Attorney for advice, and that any decision of Mr. Bowman adverse to Mr. Herd could be appealed to the Board of Zoning Appeals. The matter was discussed informally and it appeared to be the consensus of the thinking of those present that the operation as described by Mr. Herd, that is, the curing and selling of hams from hogs grown on his own farm by him, would be permissible in an Agricultural Zone; however no action was taken of any kind or character whatsoever by the Commission.

Mr. Kelly Sowers again appeared before the Commission and asked for re-zoning of what is known as the Young property on Nolensville Pike. He asked that this property be zoned Commercial. A similar request was rejected by the Commission only a few weeks ago. Mr. Robert Martin stated he had made a thorough investigation of this matter, that the number of residences in the immediate vicinity was small, that to grant this request would not only constitute spot zoning but would perhaps be the beginning of a commercial strip along the Nolens-

ville Pike in that area and for these reasons he strongly opposed granting the request. In discussing this item several questions arose, they being whether any of the property should be rezoned and if so whether the entire 6 acres or only a portion of same, and if any of that property should be rezoned whether additional property in the same immediate area and especially directly across the Nolensville Road should be rezoned. It appeared that Mr. Sowers proposed to operate a single business establishment, the same being a store, on the premises. . . .

PLAINTIFF'S EXHIBIT 1013

MINUTES OF MEETING OF WILLIAMSON COUNTY PLANNING COMMISSION June 7, 1973

The regular semi-monthly meeting of the Williamson County Planning Commission was held on the second floor of the Court House in Franklin, Tennessee, on June 7, 1973, at 7:30 o'clock P.M. Present were: T. Vance Little, Chairman, Claude Callicott, Secretary, Robert Moran, John Moran, Robert M. Collier, Larry L. Westbrook, Harry L. Sanders and Jim Crowell. Absent were Stirton Oman and John Thomas Helm. Also present were Robert Martin and David Holderfield, representatives of State Planning Commission, Mr. Joe Bowman, County Building Commissioner and Henry Denmark Bell, County Attorney. Mr. Hubert Hill, Chairman of the Budget Committee of the Quarterly County Court, was also present for a portion of the meeting.

A motion to approve the minutes of the last meeting was made by Mr. Robert Moran. This motion was seconded by Mr. Collier and was passed by unanimous vote.

The Commissioners discussed the need for a full time office in Franklin with a full time Planning Engineer and considered the amount of money that would be required for such program.

The Commission had previously on one or more occasions discussed the possibility of the Quarterly County Court providing a schedule of fees to be paid by developers of subdivisions and Mr. Robert Martin, staff representative, discussed possible schedules of such charges. It appeared that fees could be charged based upon the number of lots in a subdivision or the number of acres, and possibly other factors could be considered. It appeared that, if the Quarterly County Court should accept the recommendations of the Commission for a full . . .

. . . of Mr. Sowers be granted and accordingly that the Commission recommend what the Quarterly County Court adopt a resolution rezoning said portion of the James D. Young, Jr., property from Agricultural to Commercial A. This motion was seconded by Mr. Collier and was passed by majority vote, Mr. Westbrook and Mr. Callicott voting "no" and all other members voting "aye".

The Commission next considered an initial sketch of a proposed Cluster Development to be known as Countrywood Estates located in the Ninth Civil District. This property is known as the Brad Cook and Thomas Robertson farms, presently zoned Agricultural. It is proposed that the property be sewered by arrangements between the subdividers and the City of Franklin. Staff Repre-

sentative Robert Martin stated that he considered this sketch the best designed Cluster concept that had come before the Commission. Mr. Martin further stated that the sketch complied with the zoning and subdivision regulations. Mr. Callicott raised the question as to whether it complied with the density provisions for Cluster Zoning regulations and, while it was Mr. Martin's opinion that it did comply, Mr. Callicott was not fully satisfied and desired to look into the matter further. Mr. Westbrook moved to approve said initial sketch of Countrywood Estates as a Cluster Development. The motion was seconded by Mr. Crowell and was passed by majority vote. Mr. Collier voted "no" and Mr. Callicott abstained, he to make an examination into whether the sketch complied fully with the density provisions of Cluster Zoning regulations.

The next item on the agenda was consideration of final plat of Poplar Hills Subdivision, however Mr. Keith Broyle did not appear and the matter was not considered.

Next appearing on the agenda was final plat of Oakwood Estates Subdivision, Sections 2 and 3, located in the Tenth Civil District. However Mr. Harold Morris, who was to present these plans, asked that action be deferred and by unanimous consent this request was granted.

The Commission next considered final plat of Temple Hills Country Club Estates, Section I, a Cluster Development in the Sixth Civil District. A revised initial sketch had been approved on May 3, 1973. Staff Representative Martin stated that there were some deficiencies in the plat and it was his understanding that the Engineer, Mr. Lytle Brown, was not to present the plat for action at this

meeting. However Mr. Brown was present and asked for approval of the plat subject to obtaining signature of the County Health Department on same and subject to giving proper bond. Mr. Brown was of the opinion that the signature of the County Health Department could be obtained on the plat by the time the Commission met again and the majority of the Commissioners were of the opinion that approval should be deferred under these circumstances. Mr. John Moran moved that the plat be approved subject to proper bond being executed in the amount of \$1,255,500.00, the Secretary to prepare the bond for execution. This motion was seconded by Mr. Collier. The motion was defeated, those voting for the motion being John Moran, Robert Moran and Robert Collier; and those voting against being Mr. Crowell, Mr. Sanders, Mr. Callicott and Mr. Little. Mr. Westbrook abstained from voting on this motion. The Secretary stated that he had been assured by Mr. Vance Berry, Attorney representing the owners of the Temple Hills development, that they would be glad to execute an open space easement and insert in their covenants that the lot owners should have a preferential right to become members of the golf club.

The next item on the agenda was consideration of the final plat of Cottonwood Estates, another Cluster Development. This plat was presented by Mr. Mike Anderson, Engineer affiliated with James L. Murphy, Jr. & Co. It appeared that the plat had been signed by the County Health Department as well as by the other required parties. After consideration Mr. Collier moved to approve said final plat of Cottonwood Estates subject to proper bond being executed in the amount of \$916,150.00. This motion was seconded by Mr. John Moran and was passed by unanimous vote.

Mr. and Mrs. J. N. Franks were present and discussed Section 3 of their Redwing Subdivision but it appeared that the plat was not really ready for final consideration and accordingly they withdrew their application for approval of same.

The next item considered was final plat of Mooreland Estates presented by Mr. Harold Morris. This plat had not been signed by the County Health Department. Mr. Morris stated he thought he could obtain signature of the Health Department by the time the Commission met again and he advised that under these circumstances the plat could not be approved. He accordingly withdrew his request for approval of said plat. In the discussion of this matter it appeared that the subdividers had been required by Mallory Utility District to furnish that District with a bond guaranteeing to construct the necessary water mains, that it had also been required to furnish the City of Brentwood with a bond guaranteeing construction of all necessary sewer lines and Mr. Jack Corn, speaking for the subdividers asked that the Commission excuse the giving of bonds for water and sewer and approve the plat only upon the subdividers giving bond for the roads. Mr. Callicott pointed out that he was appreciative of the burden placed upon the subdividers in situations of this kind where bonds were apparently required to be given to more than one agency, that the statute did give the Commission considerable authority in fixing the amount of bond for roads, water, sewers and other facilities but there was grave doubt in his mind as to whether the Commission could under these circumstances excuse the giving of a bond for the water and sewer lines. He further stated that the Commission would have no remedy on a bond

given by the subdividers to Mallory Utility District or on a bond given to the City of Brentwood unless the Planning Commission should be made the . . .

. . . and unanimously passed, preliminary sketch plat of San Valley Estates Subdivision, Sections 2 and 3, in the Sixth Civil District, owned by Mr. Ray Garrett, was renewed subject to the condition that final plat must comply with any new regulations of the Planning Commission as to minimum lot size in unsewered areas.

Mr. Cletus McWilliams appeared on behalf of his clients, James H. Mangrum and Paul Byrd, Jr., in connection with request for rezoning of certain property on U. S. Highway 31 A - 41 A. He stated that the owners wished to rebuild Todd Inn which had burned quite a while ago. It appeared that Mr. Martin, staff representative, had not received adequate information which should have been given him and that he had not had sufficient time to make complete study of same, and Mr. McWilliams withdrew his application.

The next item was consideration of Mr. Robert Patterson's request for the addition of a barbecue pit and rest room facilities to the Little Circle Cafe on Sunset Road in the Seventeenth Civil District. This business is being operated as a nonconforming use. While Mr. Patterson had not complied with the technical requirement of furnishing the Commission with a plat showing the exact location and showing the exact proposed extension of said nonconforming use, it appeared that the Commission did thoroughly understand the matter. Mr. Patterson agreed that he would immediately furnish Mr. Joe Bowman, County Building Commissioner, with such plat. Mr. Collier then moved to approve said request upon diagram or plat

being furnished Mr. Joe Bowman. This motion was seconded by Robert Moran and passed by unanimous vote.

The Commission next considered request of Mr. Billy Reynolds for permission to build a ham curing place on Old Highway 96 in the Fifth Civil District. It appeared that he had consulted with Mr. Joe Bowman, County Building Commissioner, and that Mr. Bowman had refused to grant him a building permit. By unanimous consent Mr. Reynolds was advised by the Chairman of the Commission that the Planning Commission had no jurisdiction to grant such permission, that he had a right to appeal from Mr. Bowman's decision but that the appeal would go to the Board of Zoning Appeals and not to the Planning Commission.

Mr. Robert Moran moved that the Commission recommend to the Quarterly County Court that it elect Mr. Harry L. Sanders as the Planning Commission representative member on the Board of Zoning Appeals. This motion was seconded by Mr. John Moran and was passed by unanimous vote.

Mr. Howard Hood, Jr., a road building contractor, explained to the Commission the fact that, where monuments and iron pins were installed in new subdivisions prior to the time of completion of the roads, they were in the way of road builders, handicapped the road builder in performing his job, and furthermore that the road builders inevitably would destroy many of the monuments and iron pins. It was his recommendation that some definite policy be established by which these monuments and iron pins would be installed subsequent to the building of the roads. The said monuments referred to really constitute markers

of the road boundary lines. The Commission seemed to be of the opinion that insofar as the concrete monuments (street markers) were concerned there was some merit in Mr. Hood's position.

There being no further business the meeting was adjourned.

T. Vane Little, Chairman
Claude Callicott, Secretary

PLAINTIFF'S EXHIBIT 1014

MINUTES OF MEETING OF WILLIAMSON COUNTY PLANNING COMMISSION

June 21, 1973

The regular semi-monthly meeting of the Williamson County Planning Commission was held on the second floor of the Court House in Franklin, Tennessee, on June 21, 1973, at 7:30 o'clock P.M. The following members were present: T. Vance Little, Chairman, Claude Callicott, Secretary, Robert Moran, John D. Moran, Larry Westbrook, Stirton Oman, John Thomas Helm, Robert M. Collier, Harry L. Sanders and Mr. Jim Crowell. (Mr. Crowell was late and some items on the agenda had been disposed of before he arrived.) Also present were Mr. Mike Cody, representative of the State Planning Commission who appeared in the place of Mr. Robert Martin who was unavoidably absent, and Mr. Joe Bowman, County Building Commissioner.

The first item considered was a proposed amendment to the subdivision regulations with reference to minimum lot size and percolation tests in unsewered subdivisions. A public hearing had been had on this question on June 12, 1973. The concensus of opinion was that a two acre lot was larger than was necessary. Mr. Robert Moran moved that the Commission not adopt the proposed amendment as it had been advertised for public hearing. This motion was seconded by Mr. John Moran and was passed by a majority vote, Mr. Helm voting "no".

Mr. Callicott then moved that the Commission adopt as an amendment to the subdivision regulations an amendment which had been proposed by the County Health Department at a previous meeting. At one or more previous meetings Dr. R. H. Hutcheson, Director of the County Health Department, had recommended that in substance there be no new subdivisions where sanitary sewers were unavailable. Recognizing, as he said, that the adoption of such proposed amendment would probably be impossible at the present time, he then recommended an alternate amendment and this alternate amendment is the one, the adoption of which was moved by Mr. Callicott. It reads as follows:

"Where there is no feasible means to install sanitary sewers or the Water Quality Control Act requirements cannot be met, percolation test can be run under the supervision of the Health Department, and where soils percolate a given number of minutes the following requirements be required:

"Percolation absorption time in minutes is 15 minutes or less that the minimum lot size be 1 acre. Where percolation absorption time in minutes is greater than 15 minutes, but less than 45 minutes, the

minimum lot size be 2.0 acres. Where percolation absorption time in minutes is greater than 45 minutes up to 60 minutes, that lots be a minimum of 3.0 acres, and at any time the percolation absorption time is greater than 60 minutes that this tract or plot of ground will not be considered for installation of septic tank and sub-soil absorption fields but sanitary sewers will be required before construction can be permitted."

This motion was seconded by Mr. Westbrook. Four members voted for the motion, they being Claude Callicott, Stirton Oman, Larry Westbrook and John Thomas Helms; five members voted against the motion, they being Robert Moran, John D. Moran, Harry L. Sanders, Robert M. Collier and T. Vance Little.

Mr. Callicott then moved that the Commission adopt a new subdivision regulation reading as follows: "In unsewered subdivisions the minimum lot sizes shall be one acre". This motion was second by Mr. Collier and was passed by unanimous vote.

The next item considered was the final plat of Temple Hills Country Club Estates which was presented by Mr. James I. Vance Berry, Attorney. In the discussion of this plat Mr. Berry stated that he was Trustee for the developers, held legal title to the land, that he had executed and recorded an Open Space Easement which had been prepared by the Secretary of the Planning Commission conveying a permanent Open Space Easement to Williamson County, Tennessee, which covered substantially all property in the subdivision except the lots which were to be sold to individuals. Mr. Callicott stated that this easement did not grant to the public any use of the property in question but would simply preserve the areas in question as open space, that no buildings could be erected except such as

were purely incidental to the permissible open space uses as specified in the Cluster Zoning regulations and that the easement could be modified, amended or abandoned or released only by resolution of the Quarterly County Court and with the consent and approval of the Planning Commission. The easement further prevents the future subdivision of said areas. After discussion Mr. Robert Moran moved that said final plat be approved subject to the giving of proper bond. This motion was seconded by Mr. Sanders and was passed by unanimous vote of all who participated in the vote, there being two abstentions, namely, Mr. Westbrook and Mr. Callicott.

The next matter discussed was bonds to be executed in connection with Temple Hills Country Club Estates and with Cottonwood Estates. The Secretary stated that he had discussed this matter with the parties in interest, including officers of John W. Murphree Company, with Mr. James I. Vance Berry, director and also attorney for John W. Murphree Company, and as above noted attorney representing the developers of Temple Hills Country Club Estates. It appeared that John W. Murphree Company mortgage bankers now owned by Third National Corporation, a holding company, is to finance the Cottonwood Estates by loans to John D. Whalley and Martin Zeitlin, the developers, and that Hamilton Company, an affiliate of Hamilton Bank, is to finance Temple Hills Country Club Estates. It appeared further that these two lending agencies were willing and desired to execute the respective completion bonds as surety. Mr. Berry agreed to furnish the Secretary with an opinion that John W. Murphree Company could lawfully execute the bond in question as surety. After full discussion, Mr. Col-

lier moved that the completion bond as to Cottonwood Estates be executed by the developers, John D. Whaley and Martin Zeitlin, as principal, by John W. Murphree Company as surety and that as additional security the developers pledge a Letter of Credit or Certificate of Deposit issued by an acceptable bank in the amount of one-fourth ($\frac{1}{4}$) of the amount of the bond; that the bond as to Temple Hills Country Club Estates be executed by the developers, by the Hamilton Company as surety, and that the developers also pledge as additional security a Letter of Credit or Certificate of Deposit issued by an acceptable bank in the amount of one-fourth ($\frac{1}{4}$) of the amount of the bond. This motion was seconded by Mr. Robert Moran and was passed by unanimous vote. The amount of the bond as to Cottonwood Estates had previously been set at \$916,150.00 and it appeared that the estimated cost of Temple Hills Country Club Estates would be \$1,255,500.00. It was further agreed that the amounts of the bonds be in these respective amounts.

Mr. and Mrs. J. N. Franks presented for approval final plat of Redwing Farms, Section 3. Mr. Westbrook called to the attention of the Commissioners the fact that there was a very serious drainage problem in connection with the various and sundry sections of Redwing Farms, that there was an open ditch which was holding water. Mr. and Mrs. Franks and their engineer were of the opinion that the amount of additional work to cure this problem would not be extensive. Mr. Callicott called to the attention of the Commission the fact that bond for Section 2 had never been posted. Mr. and Mrs. Franks replied that they had been trying to . . .

PLAINTIFF'S EXHIBIT 1016

MINUTES OF MEETING OF
WILLIAMSON COUNTY PLANNING COMMISSION

OCTOBER 4, 1973

The regular semi-monthly meeting of the Williamson County Planning Commission was held at the Court House in Franklin, Tennessee, on October 4, 1973, at 7:30 o'clock P.M. Present were: T. Vance Little, Chairman, Claude Callicott, Secretary, Larry L. Westbrook, John Moran, Harry L. Sanders, Clyde S. Gay, Jr., and Robert Moran. Absent: Stirton Oman, Robert M. Collier and Jim Crowell. The County Building Commissioner, Mr. Joe Bowman, and the Staff Representative, Mr. Robert Martin, were also present.

The Chairman, Mr. Little, presented to the Commission for its consideration a document entitled "The General Plan for the Development of Williamson County". Mr. Little stated that a Citizens Advisory Committee appointed by County Judge Fulton Greer had been meeting with the Williamson County Regional Planning Commission on Monday nights and that the plan which had been prepared and was being submitted represented a consensus of the thinking and opinions of the entire group. The Secretary stated that those members of the Commission who had been able to do so had been faithful in their attendance, that the members of the Citizens Advisory Committee had been working very faithfully and exhibited a true and deep interest in the welfare of the county and that Mr. T. Vance Little, Chairman of the Commission, had spent much time and effort in working on the plan

and preparing same and presiding at the meetings that had been held and had demonstrated capable and effective leadership in all matters pertaining to the plan. By unanimous agreement and consent the Commission agreed on certain amendments, most if not all of which consist of changes in phraseology, said amendments being as follows:

1. Under "Economic Development" on pages 8 and 9 the paragraph on "Industrial Zoning", as presented, reads as follows:

"Industrial Zoning. Generally, the concept of decentralization of industry should be promoted. Industry should be encouraged to locate near population concentrations in the County, thus discouraging inter-county commuting of workers. Various methods of attracting industry should be used, including private enterprise, acquisition and sale of land by the county, and industrial revenue bond issues. No effort should be made to attract major industrial plants to the County. It is recommended that no more than 1,000 workers be employed at any plant site. Land in various parts of the county should be zoned for industrial uses, taking into consideration transportation facilities. Much of this industrial land should be located in the Highland Rim section of the County. Other industrial areas should be located near Nolensville, Hillsboro, Triune, College Grove, Thompson Station and the Harpeth Community."

This paragraph was amended so as to read as follows:

"Industrial Zoning. Generally, the concept of decentralization of industry should be promoted. Industry should be encouraged to locate near population concentrations in the County, thus discouraging inter-county commuting of workers. Various methods of attracting industry may be used, including private en-

terprise, acquisition and sale of land by the County, and industrial revenue bond issues. No effort should be made to attract major industrial plants to the County. It is recommended that no more than 1,000 workers be initially employed at any plant site. Land in various parts of the County should be zoned for industrial uses, taking into consideration transportation facilities. Much of this industrial land should be located in the Highland Rim section of the County. Other industrial areas may be located near Nolensville, Hillsboro, Triune, College Grove, Thompson Station and the Harpeth Community."

2. The last sentence of that paragraph entitled "Agriculture", commencing on page 9 and ending on page 10, as presented, reads as follows:

"In order to promote the continuation of agricultural activities in an area zoned for residential uses, the County Court should consider a system of retroactive taxes whereby land used for agricultural purposes in a residential zone would be taxed as agricultural land until it is sold for development, at which time the tax differential for a specified number of years would be paid."

This sentence was amended so as to read as follows:

"In order to promote the continuation of agricultural activities in an area zoned for residential uses, the County Court may consider a system of retroactive taxes whereby land used for agricultural purposes in a residential zone would be taxed as agricultural land until it is sold for development, at which time the tax differential for a specified number of years would be paid."

3. The second sentence in that paragraph entitled "The Harpeth River", on page 16 as presented, reads as follows:

"The streams should be left in their natural states insofar as possible."

This sentence was amended so as to read as follows:

"The streams should be left in their natural states insofar as practical."

4. The last sentence in that paragraph entitled "Mobile Homes" on page 17 as presented read as follows:

"However, mobile homes should be closely regulated and prohibited in all areas other than agricultural zones and specially zoned mobile home parks."

This sentence was amended so as to read as follows:

"However, mobile homes should be closely regulated and prohibited in all areas other than in the agricultural zone and specially zoned mobile home parks."

In voicing their approval of the overall plan, some members of the Commission observed that the plan possibly contained some specific statements and recommendations with which they did not concur and that they recognized said plan as being a statement or declaration of policy but not necessarily binding in any legal sense insofar as determining how the members of the Commission should vote in the future on any specific issue.

Mr. Robert Moran then moved to approve said plan as amended in the particulars hereinabove set out and to recommend that it be adopted by the Quarterly County Court of Williamson County, Tennessee. This motion was seconded by Mr. Larry Westbrook and was passed by unanimous vote.

The Secretary stated that he had received a letter from Mr. J. W. Cross III, President of Tower Real Estate Development Corporation, stating that his firm had com-

pleted all improvements in Section I of Oakwood Estates Subdivision, that the Commission was holding as security on the completion bond Certificate of Deposit in the amount of \$38,000.00 and that he would like to have said Certificate of Deposit released and was willing to give the maintenance bond as required. Mr. Joe Bowman, County Building Commissioner, stated that the improvements had been completed as reported by Mr. Cross. Upon motion made by Mr. John Moran, seconded by Mr. Sanders and passed by unanimous vote, the Secretary was authorized to release said completion bond and to deliver to Mr. J. W. Cross III or to his corporation, Tower Real Estate Corporation, said Certificate of Deposit upon the Secretary receiving a letter from the County Attorney informing him that proper maintenance bond had been executed and filed.

The Commission next considered the application of Mr. William Richardson for approval of preliminary sketch plat of subdivision entitled Spencer Creek Place located in the Eighth Civil District. The Staff Representative, Mr. Robert Martin, discussed the plat, stated that it conformed to the regulations and recommended approval, stating that the applicant's request that the final plat be on the scale of 1" to 200 ft. was reasonable and proper. Mr. Robert Moran moved that said preliminary sketch plat be approved with authority granted to draw the final plat on the scale of 1" to 200 ft. This motion was seconded by Mr. John Moran and passed by unanimous vote.

Mr. Reece L. Smith and his Engineer, Mr. George Daniels, presented for approval initial sketch of the proposed Cluster Development to be known as Stonehaven, located in the Seventh Civil District. Mr. Martin explained that as was indicated on the plat a portion of this area was

zoned as Office Building Zone and authorized any use permitted in a Residential Zone and contained other requirements or regulations far less restrictive than those applicable to Agricultural B Zone and certain other zones. This proposal called for condominiums in the area zoned Office Building Zone and for residences in the other areas. Attention was called to the fact that the plans called for a private road and Mr. Smith stated that this road was to be maintained by the Home Owners Association to be established. The Staff Representative, Mr. Robert Martin, recommended approval of the initial sketch. Upon motion of Mr. John Moran, seconded by Mr. Robert Moran and passed by unanimous vote, said initial sketch plat of Stonehaven was approved.

The Commission was next asked to renew its approval of preliminary sketch plat of subdivision entitled Hooker Hills located in the Fourteenth Civil District. The Staff Representative stated that this preliminary plat had been approved on February 8, 1972, subject to installation of 6" water lines and subject to water for said lines being available, that the water lines had now been installed that water service was available and that he recommended a renewal of the approval of preliminary sketch plat of Hooker Hills and also recommended approval of the final plat which was also on the agenda for consideration.

The final plat of Hooker Hills was then submitted for approval by Mr. Mike Anderson, Engineer associated with James L. Murphy, Jr., & Company. Mr. Westbrook moved that said final plat be approved subject to proper completion bond in the amount of \$18,000.00 (?) being filed. This motion was seconded by Mr. Sanders and was passed by unanimous vote.

Mr. James L. Murphy, Jr., Engineer, presented for approval final plat of Deerfield Planning, Section 2, located in the Eighth Civil District. Approval was recommended by the Staff Representative, Mr. Martin. Mr. Robert Moran moved that said final plat of Section 2, Deerfield Planning, be approved subject to completion bond in the amount of \$22,500.00 being filed. This motion was seconded by Mr. Sanders and was passed by unanimous vote.

The Commission next considered the request for approval of final plat of Lake Colonial Estates, Section I, located in the Twenty-Third Civil District, this request being also submitted by Mr. James L. Murphy, Jr. It appeared that no roads were to be constructed and no water mains to be installed in the Section I. Mr. Robert Moran moved to approve said final plat of Section I of Lake Colonial Estates and that no completion bond be required. This motion was seconded by Mr. Westbrook and was passed by unanimous vote.

The next item considered was the request of Mr. Don Hall that the Commission recommend that the Quarterly County Court change the zoning of a tract of land owned by him located at or near the intersection of Interstate Highway 40 and State Highway 96 from Agricultural to Commercial A. It appeared that this property adjoins certain property owned by Dickson Motel Corporation which the Commission had heretofore recommended for such change of zoning. Mr. Martin voiced no objection to this proposed rezoning. Mr. Westbrook moved that the request be granted and that the Commission recommend that the Quarterly County Court rezone the said Don Hall property from Agricultural to Commercial A. This motion was seconded by Mr. Gay and was passed by unanimous vote.

Forest Home, Inc., then submitted its request that the completion bond on Forest Home Farms, Section 3, be released upon proper maintenance bond being furnished. Mr. Bowman stated that all improvements called for had been completed and that it was proper for . . .

PLAINTIFF'S EXHIBIT 1022

MINUTES OF MEETING OF WILLIAMSON COUNTY PLANNING COMMISSION

June 6, 1974

The regular meeting of the Williamson County Planning Commission was held at the Court House in Franklin, Tennessee, on June 6, 1974, at 7:30 o'clock P. M. Present were: T. Vance Little, Chairman, Claude Callicott, Secretary, Harry L. Sanders, Clyde S. Gay, Jr., Jim Crowell; also Mr. Joe Bowman, County Building Commissioner, and Mr. Robert Martin, Staff Representative. Absent were Stirton Oman, Larry L. Westbrook and Robert N. Collier.

The first item presented to the Commission for consideration was the request of Mr. and Mrs. John Stark, through their attorney, Mr. Tom Beasley, for a rezoning of a tract of land owned by them in the First Civil District, the present zoning being Agricultural and the desired zoning being Commercial. A similar request had previously been disapproved because the Stark property did not front on a public road. Mr. Beasley stated that the Starks had purchased an additional strip of land 50 feet wide and fronting on the public highway and it was the opinion of the Commissioners that the request should be granted.

Accordingly, Mr. Sanders moved that the Commission recommended to the Quarterly County Court that it change the zoning of said Stark property from Agricultural to Commercial. This motion was seconded by Mr. John Moran and passed by unanimous vote.

The Chairman, Mr. Little, presented to the Commission a copy of a letter which he had received, the letter being from Marshall S. Stuart, Executive Director, Mid Cumberland Counsel of Governments, addressed to the County Judge, Fulton Greer. This letter requested would not exist as forcefully as they once had and that there were some situations where it was not practical or feasible to insist on said 1,200 feet block limits. After further discussion, Mr. Robert Moran moved that this revised plat and the subject matter be referred back to Mr. Martin for further study and for consultation with Mr. Peery in the hope that a satisfactory plat might be worked out. This motion was seconded by Mr. Gay and was passed by unanimous vote.

Mr. Lyte Brown, Engineer, presented for approval changes in the preliminary plat and changes in the final plat of Section I of Temple Hills Country Club Estates. The requested changes were changes in the names of the roads except Temple Road and relocation of the swimming pool and tennis courts. This request of Mr. Brown was recommended by Mr. Martin. Mr. Sanders moved that the suggested changes in the preliminary plat be approved. The motion was seconded by Mr. John Moran and passed by unanimous vote. Mr. Robert Moran moved that the final plat of Temple Hills Country Club Estates Section I Revised, containing changes in the final plat of Section I be approved. This motion was seconded by Mr. John Moran and passed by unanimous vote.

Mr. Leroy Holland, Engineer, presented for approval preliminary plat of Forrest Home Farms, Section 7, located in the Sixth Civil District. The Staff Representative, Mr. Martin, stated that High Point Road contained one or more sections more than 1,200 feet in length without a stub-out street and noted further that the plat did contain some road grades which would call for variances. The Engineer stated that there were three of these variances requested, namely, one 600 ft. grade of 15%, one 250 ft. grade of 13% and one 100 ft. grade of 11%. The Commissioners were of the opinion that, in view of the size of this subdivision, its topographical features and other facts and circumstances the variances requested were reasonable and should be granted. Mr. Robert Moran moved that the plat be approved with said variances above mentioned. The motion was seconded by Mr. John Moran and passed by unanimous vote.

PLAINTIFF'S EXHIBIT 1032

MINUTES OF MEETING OF WILLIAMSON COUNTY PLANNING COMMISSION JUNE 19, 1975¹

The regular meeting of the Williamson County Planning Commission was held at the Court House in Franklin, Tennessee, on June 19, 1975, at 7:30 o'clock P. M. Present were: T. Vance Little, Chairman, Claude Callicott, Secretary, Robert Moran, John Moran, Larry Westbrook and Harry Sanders. Absent were: Stirton Oman, Clyde Gay, Mitchell Beard and Jim Crowell. Also present were

Thomas Ragsdale, Staff Representative, and Joe Bowman, County Building Commissioner.

Mr. Reed Mullins, representing Temple Hills Country Club Estates, presented for approval a revised preliminary plat of said subdivision as a whole, the same being located in the Sixth Civil District. Two previous sections of this subdivision have received final approval. The principal change desired to be made is with respect to the location of certain recreational facilities. No change in the boundaries of the open space areas is contemplated, the change of said facilities being a change from one portion of the open space to another portion of the open space. The Secretary advised that any change in the boundaries of the open space would probably require action by the Quarterly County Court since, according to his recollection, the Open Space Easement which had been conveyed to Williamson County and which the Secretary had prepared, requiring that no change could be made in same except by joint action of the Planning Commission and the Quarterly County Court.

Mr. Ragsdale recommended the approval of said preliminary plat. Mr. Robert Moran moved to approve same. The motion . . .

PLAINTIFF'S EXHIBIT 1056

MINUTES OF THE MEETING OF THE
WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION

April 20, 1978

The regular semi-monthly meeting of the Williamson County Planning Commission was held at the Courthouse in Franklin, Tennessee, on April 20, 1978, at 7:30 p.m. Present were Messrs. Claude Callicott, Chairman; Sid Smith, Vice-Chairman, Bobby Pitts; Ernie Blankenship; Robert Moran; Mitchell Beard; and Judge Wilburn Kelley. Staff Representatives present were Tom Ragsdale, County Planner; and Joe Bowman, County Building Commissioner.

The meeting was called to order by Claude Callicott, Chairman; at 7:33 p.m.

The meeting began with the reading and approval of the minutes of the March 16, 1978, Planning Commission Meeting. A motion was made by Ernie Blankenship to approve the March 16, 1978 minutes as they read. Motion was seconded by Robert Moran, and unanimously carried.

Item I, discussion of the "loop street" around Franklin. Mr. Elbert Bagby, City Coordinator, was not present to discuss the loop street, and since it had been his request to do so the commission postponed the item.

Item II, Mr. Dan Boone, resident of Sneed Road, wished to discuss installation of fire plugs on county roads. Mr. Boone came forward to speak to the commissioners. Mr. Boone explained that he lived on Sneed Road at the north end of the county, and . . .

Mr. Ragsdale moved on to say that the next point of concern was the water and sewer treatment, at the present time the plans for the sewage treatment plant and water lines have been sent to the state. Mr. Ragsdale has not received any word from them.

Stonebrook's sewage treatment system will be constructed by the developer and eventually given to the Nolensville Utility District.

Mr. Westbrook asked if there was still a moratorium on the Nolensville Utility District. Mr. Ragsdale said as he understood it the moratorium was still in effect.

Mr. Callicott felt that they should not give final approval to any plat until they were positively sure that water could be obtained.

A motion was made by Larry Westbrook to postpone final approval for Stonebrook until a solution for the water, sewer, and for the spite strip were available. Motion was seconded by Mitchell Beard, and unanimously carried.

Item IV, the developers of Temple Hills requested renewal and revision of its preliminary plan.

The developers wanted to move the entrance to the Club House from Canterbury Lane to Temple Road. They also wanted to renew the preliminary plat with the revision. Staff pointed out that they should discuss the bond situation.

A motion was made by Sid Smith to revise and renew the preliminary plat. Motion was seconded by Bobby Pitts, and unanimously carried.

Mr. Ragsdale explained to the commission that they had an original bond for \$1,255,500.00, executed in July of 73 with the completion date set for two years, however a surety bond is valid for 6 years and the bond was nearing that time. Mr. Ragsdale also said that the roads were

not up to county standards at the present time. Mr. Ragsdale reminded the commission that they had discussed reduction of the bond about 2½ years ago, and the commission moved to reduce the bond to \$300,000.00, however at that time the problem with the financial institution went into effect and everything went on hold. Mr. Ragsdale felt that \$300,000.00 would cover what they needed. Mr. Jim Patterson wanted to reduce the bond to \$200,000.00.

A motion was made by Mitchell Beard to reduce the bond to \$300,000.00. Motion was seconded by Sid Smith, and unanimously carried.

Item V, Mr. R. C. Adams developer of Franklin East requested final approval of section I, located in the 14th Civil District on Highway 96 East.

Leon Stanford came forward to represent Mr. Adams, he told the commission that the plat had been approved at one time and the bond was not posted. The commission had just recently reinstated the preliminary plat. Mr. Callicott pointed out that the commission received a letter from Milcrofton and from the state approving 29 water taps for Franklin East.

Mr. Stanford told the commission that there are no fire plugs, however Milcrofton Utility District does not want fire plugs.

PLAINTIFF'S EXHIBIT 1057

MINUTES OF THE MEETING OF THE WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION

May 4, 1978

The regular semi-monthly meeting of the Williamson County Planning Commission was held at the Courthouse in Franklin, Tennessee, on May 4, 1978, at 7:30 p.m. Present were Messrs. Claude Callicott, Chairman; Sid Smith, Vice-Chairman; Clyde Gay, Secretary; Bobby Pitts; Judge Wilburn Kelley; Robert Moran; Ernie Blankenship; and Mitchell Beard.

The meeting was called to order by Claude Callicott, Chairman at 7:30 p.m.

The meeting began with the reading and approval of the minutes of the April 20, 1978 Planning Commission Meeting. A motion was made by Ernie Blankenship to approve the April 20, 1978 minutes with one correction, page 6 "work" should be "word". Motion was seconded by Robert Moran, and unanimously carried.

The Commissioners then moved on to an item of old business. Mr. Tom Fox, County Attorney, had received an offer of \$2,000.00 to settle an old lawsuit concerning Murray Estates (formerly known as Twin Lawn Subdivision). It was Mr. Fox's and staff's opinion that the Planning Commission settle the suit for \$2,000.00.

Mr. Sid Smith asked what needed to be done. Mr. Ragsdale said that the ditches needed to be dressed, and some patching needed to be done on parts of the roads. Mr. Smith concluded that it came down to taking the \$2,000.00 or continuing the lawsuit.

... a letter written to the realtors, and what requirements would be necessary to stabilize the A & B parcels. Mr. Granstaff added that the only thing they had not been

able to do was to show the building configuration and where the driveways were going in and where the retaining walls would be.

Sid Smith withdrew his suggestion, because they were reserved parcels and a building permit should not be issued to a reserve parcel in the first place. Mr. Smith suggested that the Commission examine the plat as it was. Mr. Pitts asked why they shouldn't approve it without the two lots. Mr. Smith explained in order to eliminate the two reserve lots Mr. Freeman would have to take them off, reprint the plat, and bring it back to the next Planning Commission Meeting.

A motion was made by Sid Smith to defer action on the final plat of Highgate, recommending to Mr. Freeman and Mr. Granstaff that they eliminate the two reserve parcel lots A & B, and bring it back to the next Planning Commission Meeting as the first item on the agenda. Motion was seconded by Bobby Pitts, and unanimously carried.

Item V, Stanford and Associates requested preliminary approval of Owl Creek, located in the 16th Civil District on Bluff Road. Item V was withdrawn.

Item VI, Stanford and Associates requested final approval of section IV of Temple Hills Country Club Estates, located in the 6th Civil District off Temple Road.

Mr. Jim Patterson came forward to speak to the Commission about Temple Hills. Mr. Ragsdale reminded the Commission that Temple Hills had been given preliminary approval at the previous meeting. The plat contains 35 acres, 60 lots, and 4,276.8 feet of new road. The only question staff had was setting the bond at \$180,000.00.

A motion was made by Robert Moran to grant final approval to Temple Hills Section IV, subject to a \$180,000.00 bond."

Mr. Leon Stanford asked that the minutes show how they planned to construct the roads. They proposed on Section I and III to complete the roads when homes are completed on the cul de sacs, and have them released from performance bond and placed on maintenance. On Section IV they proposed to construct the roads to base with J.B.S.T. without curbs until 80% of the home was completed on each lot. At that time place curbs and final D.B.S.T. and request a maintenance bond.

Motion was seconded by Sid Smith, and unanimously carried.

Item VII, the developers of Farmington Subdivision requested final approval, located in the 8th Civil District on Berry's Chapel Road. Item VII, was withdrawn.

Squire Ed Fox, representing the people from the Pine-wood Valley area, came forward to discuss the Nashville Music Festival. Mr. Fox wanted to go on record as asking the Planning Commission to do everything in its power to keep the Nashville Music Festival from actually taking place. The people Squire Fox represented felt it would be infringing on their rights. Squire Fox told the Planning Commissioners that Mr. Ragsdale had pointed out a couple of instances where the Festival participants would be . . .

PLAINTIFF'S EXHIBIT 1073

MINUTES OF THE MEETING OF THE WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION

August 16, 1979

The regular semi-monthly meeting of the Williamson County Planning Commission was held at the Courthouse in Franklin, Tennessee on August 16, 1979 at 7:30 p.m.

Members present:

Dr. Robert Medaugh
Mitchell Beard
Ernie Blankenship
Clyde Gay
Pete Mosley
Joe Baugh
Judge Kelley
Ann Petersen
Bobby Pitts, Chairman

Staff Present:

Morton Stein, County Planner
Dave Demerich, County Engineer
Tommy Watson, Building Commission Assistant

The meeting was called to order by Mr. Bobby Pitts, chairman at 7:35 p.m.

The Planning Commissioners then considered the minutes of the August 2, 1979 meeting. Motion was made by Clyde Gay to approve the minutes. Ernie Blankenship seconded the motion; motion passed unanimously.

OLD BUSINESS: ITEM I: PUBLIC HEARING

Morton Stein gave the background on the Public Hearing. The Planning Commission is considering an amend-

ment to consider additional criteria to page 4, section B, 7 of the Williamson County Regional Planning Commission Subdivision Regulations concerning reapproval of Preliminary Plats. Mr. Stein explained that the Public Notice stated that the Commission will consider the following alternative recommendations concerning Preliminary Plat renewal:

1. That all Preliminary Plats approved before August 16, 1979 shall be made retroactive to the original approval date and that if final plats covering all the lots on the Preliminary Plat have not been approved by the Commission by July 1, 1982, that the Preliminary Plat of the remaining lots shall be approved under the standards existing at the date of submittal.

2. Evaluate progress of development and if developer has shown significant progress during the past year renew plat under original regulations. If no significant progress, renew plat as if it were a new plat. The Commission shall establish a criteria for "significant progress" as:

25 percent of the lots approved on final plats each year irregardless of the size of the subdivision.

He said that the County Attorney stated that the Commission was not bound to the wording of the two alternatives, but could only consider amending Sentence B, 7 of the regulations.

Sentence B, 7 states: The approval of the Preliminary sketch plat shall lapse unless a final plat based thereon is submitted within one year from the date of such approval unless an extension of time is applied for and granted by the Planning Commission.

Ernie Blankenship explained the recommendation by the Subdivision Regulation Committee. He stated that the Subdivision Regulation Committee had arrived at the position that all Preliminary plats coming forth for renewal would or could be approved under existing regulations they were originally approved under when filed. The Subdivision Regulations Committee had a cut-off date established of July 1, 1982 that said if all final plats were not in covering a Preliminary at that time they would on that date fall under new Regulations that may have been passed since the Preliminary was approved.

Morton Stein, County Planner, gave a recommendation that all plats should be approved as new plats. A way of wording this is to add the following sentence to B, 7 of Subdivision Regulations.

Renewal shall be granted provided the preliminary plat meets regulations and situation at the time of renewal.

There were several members of the audience commenting on the Subdivision Regulation changes. Residents from Temple Hills Subdivision and Countrywood encouraged the commissioners to pass the new Subdivision Regulations. Some residents brought up the point of what is going to be done to correct inconsistencies and how are we going to keep them from happening in the future. County Commissioner Gayle Moyer was in favor of stricter regulations and urged the commissioners to consider the good of the county in adopting Regulations. John Stewart a resident of Temple Hills Subdivision came before the commissioners and said "lets start now and go forward with the regulations as they stand and support your plan."

Members of audience speaking for stricter regulations were County Commissioners Gayle Moyer and Robert Ring, residents of Countrywood, Jim McGee, Charlie Strong, and Jim Lamb, Temple Hills residents John Stewart and Jim McNeil were also in favor of stricter regulations. Gene Cross, Tom Ragsdale and Bill Eason were against the stricter regulations. Bill Eason stated that there were serious legal questions that should be looked in to.

Judge Kelley made a motion to amend the sentence to B, 7 under Preliminary Sketch Plat in accordance with the County Planners recommendation; Motion was seconded by Mitchell Beard.

At this time Clyde Gay, Secretary of the Planning Commission resigned from the Planning Commission.

The Planning Commission then voted on the motion. Those in favor of the motion were Dr. Robert Medaugh, Pete Mosley, Joe Baugh, Judge Kelley, Ann Petersen, and Mitchell Beard. Those voting against the motion were Bobby Pitts, chairman of the Planning Commission and Ernie Blankenship. Motion passed 6 to 2.

At this time Ernie Blankenship resigned from the Planning Commission.

ITEM II: GERARD NEBEL REPRESENTING FDIC REQUEST APPROVAL OF PRELIMINARY PLAT OF COUNTRYWOOD ESTATES. *DISAPPROVED.*

Morton Stein said the Planning Commission has two options:

1. To renew plat with the stipulations that it meet all our current regulations.
2. Disapprove the plat until it is presented, meeting our regulations.

The staff recommended to renew plat with stipulations that it meet our current regulations. When the next final was handed in we would review the final with relationship to our new regulations. Another stipulation for Countrywood would be that the next final plat would have all of open space on that plat. It was noted that there was no one representing FDIC at the meeting to present the plat or answer questions.

Pete Mosley made a motion to disapprove until a plat is submitted by someone representing the developer or owner of the development. Mitchell Beard seconded the motion; Motion passed unanimously.

ITEM III: REQUEST RENEWAL OF THE PRELIMINARY PLAT OF TEMPLE HILLS COUNTRY CLUB ESTATES SUBDIVISION, LOCATED ON SNEED RD. IN THE 6TH CIVIL DISTRICT. *APPROVED.*

Staff recommended to renew plat under 1979 regulations. Judge Kelley made a motion to renew plat under new regulations and Pete Mosley seconded the motion. Don Harris, an attorney representing the Temple Hills homeowners association asked that it not be renewed because of problems with open space in the development and with the restrictive covenants which were changed by the developer. The people of Temple Hills want the developer to make restrictive covenants and to define open space be-

fore action is taken on Preliminary Plat. After hearing Mr. Harris' discussion, Judge Kelley withdrew his motion.

After a very lengthy discussion Ann Petersen made a motion to renew plat under 1979 regulations. Motion was seconded by Joe Baugh; motion passed 4 to 2 with Mitchell Beard and Judge Kelley voting no, Pete Mosley, Joe Baugh and Ann Petersen voting yes, Robert Medaugh, abstained.

ITEM IV: GERALD BUCY, REPRESENTING CROSS PROPERTIES, REQUEST REAPPROVAL OF PRELIMINARY PLAT OF STONEBROOK SUBDIVISION UNDER 1975 REGULATIONS. *WITHDRAWN.*

ITEM I: NEW BUSINESS: BOND REDUCTION REQUEST FOR SETTLER'S POINT SUBDIVISION. *APPROVED.*

There is now a letter of credit bond on Settlers Point due to expire on November 1, 1979. Dave Demerich, County Engineer stated that the developer has completed substantial work in the subdivision. The staff recommended a bond reduction in the amount of \$17,000.00. Ann Petersen made a motion to accept the bond reduction; motion was seconded by Mitchell Beard and passed unanimously.

With no further business to come before the commissioners the meeting was adjourned at 10:30 p.m.

Bobby Pitts, chairman
Secretary

PLAINTIFF'S EXHIBIT 1087

MINUTES OF THE MEETING OF THE WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION

OCTOBER 2, 1980

Members Present:

Leanore Wartell
Mitchell Beard
Judge Wilburn H. Kelley, Jr.
Pete Mosley
Jack Meagher
Joe Baugh
Joey Davis
Dr. Robert Medaugh
Ann Petersen

Staff Present:

Morton Stein, County Planner
Thayer Martin, County Engineer

The meeting of the Williamson County Regional Planning Commission was called to order at 7:40 p.m.

Old Business:

State Representative Cliff Frensley was present to discuss water problems in the Flat Creek area. Representatives from Williamson County met with the Maury County Water Commission last week to discuss the water problem and the possibility of buying water from Maury County. Mr. Frensley felt it would be more feasible to get water from Maury County for the Flat Creek Community since the water lines are so close. The engineer for Maury County, Joel Spalding is going to do some preliminary work and come up with recommendations in terms of try-

ing to persuade Maury County to extend their lines or whether to tie onto one of the Utility Districts in Williamson County or create a new district.

Judge Kelley thanked Mr. Frensley in assisting with the water problem in Williamson County.

Stan Nelson came before the commission to discuss an interim solution to the water problems of Williamson County. The most feasible alternative is a small water plant on the South Harpeth River in the vicinity of Highway 100 and 96. The water plant would be sized for approximately three million gallons per day and have a 63,-350 foot water line along Highway 96 to the center of the county. The estimated cost of this project is 7.4 million dollars.

Mr. Stein prepared a resolution concerning a pre-application for grant/loan funds to build a water plant and necessary water lines on the South Harpeth River. Staff recommended that this resolution be passed and get this process started. (see enclosed resolution).

Motion was made by Ann Petersen to pass this resolution. Jack Meagher seconded the motion; motion carried.

ITEM I: CONSIDER PERFORMANCE BONDS FOR THE SPRINGVIEW SUBDIVISION LOCATED OFF TOM ROBINSON ROAD IN THE 10TH CIVIL DISTRICT. *EXTENDED.*

Mr. Martin reported that the grass is growing well and the ditches are beginning to shape up and the final toping is down on the streets. The paving company will get the shoulders in shape in the next few weeks. Mr. Martin

recommended extending the performance bond for two months.

Motion was made by Pete Mosley to extend the performance bond for Springview for two months provided a letter of credit is brought into our office. Leanore Wartell seconded the motion; motion carried.

ITEM II: CONSIDER PERFORMANCE BOND FOR OWL CREEK SUBDIVISION LOCATED OFF BLUFF ROAD IN THE 16TH CIVIL DISTRICT.

Mr. Martin's latest inspection revealed that an erosion control plan and the ditch work in this subdivision has not been started. Staff recommended calling the bond on Owl Creek Subdivision if the work has not been started by October 7, 1980.

Motion was made by Dr. Robert Medaugh to accept the staff recommendation and call the bond if work has not been started by October 7, 1980 and if work has been started then extend the bond for a one month period. Jack Meagher seconded the motion; motion carried.

ITEM III: CONSIDER PERFORMANCE BOND FOR STONEBROOK SUBDIVISION SECTIONS I, II, III, IV & V LOCATED OFF NOLENSVILLE ROAD IN 17TH CIVIL DISTRICT.

Mr. Gerald Bucy, representing Stonebrook Division, told the Planning Commission that all the ditches in sections I, II & III have been re-seeded and shot rock has been placed on all the ditches that were particularly hard to stabilize to hold the siltation down (see enclosed letter to Mr. Martin). Also Mr. Bucy requested a bond reduction

on Sections IV & V. Mr. Martin stated that progress has been made in sections IV & V but felt that it was not in the county's best interest to reduce the bonds.

Staff recommended a two month extension for Sections I, II & III to provide time for the stabilization of the ditches. Also, the staff recommended renewing the bond for Sections IV & V for a period of one year with no reduction of the bond. Motion was made by Pete Mosley to accept staffs recommendation. Jack Meagher seconded the motion; motion carried.

ITEM IV: CONSIDER THE MAINTENANCE BOND FOR THE HIGHGATE SUBDIVISION SECTION II LOCATED OFF FRANKLIN ROAD IN THE 8TH CIVIL DISTRICT. *EXTENDED.*

Staff recommended a two month extension to allow the developer to re-sod and re-seed this section. Motion was made by Jack Meagher to extend Section II of Highgate for two months. Dr. Robert Medaugh seconded the motion; motion carried.

ITEM V: CONSIDER THE MAINTENANCE BOND FOR FORREST HOME FARMS SUBDIVISION SECTION VI LOCATED OFF HIGHWAY 96 IN THE 6TH CIVIL DISTRICT.

Mr. Dickinson told the planning commission that there are six lots in this section and four of the six lots have been sold. Mr. Dickinson and the County Engineer looked over this section and found that one more culvert and headwall are needed. Mr. Martin suggested that either the work be completed in a manner acceptable to Mr. Hatcher and him-

self or a one month extension on the performance bond at least three days before the due date of the letter of credit.

Motion was made by Leanore Wartell that if the work on the road of section 6 is satisfactorily completed by next week that the road be accepted by the County and that if not completed to satisfaction of the County Engineer and Highway Superintendent that the bond be extended for a period of one month. Pete Mosley seconded the motion. Motion carried with a vote of 7-1 with all members voting in favor of the motion except Joey Davis who voted no.

CONSIDER THE PERFORMANCE BOND FOR SETTLERS POINT SUBDIVISION LOCATED OFF OLD HILLSBORO ROAD IN THE 6TH CIVIL DISTRICT. *DEFERRED.*

The developer of Settlers Point has the gravel placed and would like to get all of his foundations started next spring so he will be at least 80% buildout. By May or June he would like to put his binder and topping down and then go onto a Maintenance Bond for one year. The bond for Settlers Point is due 11/1/80 and the developer would like an extension until June 1, 1981. (see enclosed letter from Bill Eason).

Mr. Martin pointed out that there are a lot of driveways going onto the street and he has received complaints from people driving on Old Hillsboro Road. He told the commission that he feels that the developer should get the gravel off the paved portion of the road. Also there is a small amount of erosion on Highway 96 that needs to be taken care of.

Motion was made by Ann Petersen to defer action on this item until the October 16, 1980 meeting. Judge Kelley seconded the motion; motion carried.

ITEM VII: CONSIDER PERFORMANCE BONDS FOR TEMPLE HILLS SUBDIVISION SECTIONS IV AND V LOCATED OFF TEMPLE ROAD IN THE 6TH CIVIL DISTRICT.

Mr. James Patterson reported to the Planning Commission that the water and sewer are completely in on Sections IV & V and they are in the process of putting in all the electrical work. Mr. Patterson requested a one year extension on the Performance Bonds of Sections IV & V.

Mr. Martin reported that some measures for an erosion control plan have been taken. The bales have been put down as requested by the county engineer but when he checked this subdivision he did not observe that they had been staked. Mr. Martin reminded the Planning Commission that this has been extended several times. Also, there are a lot of mitigating circumstances surrounding this issue but to be consistent with what the planning commission has been doing in the past Mr. Martin recommended calling the bond.

Mr. Stein stated that the bond for section IV is due 12/1/80 and section V is due 10/15/80 and that there is no way that the developer can pave between now and December 1 unless he goes to hot mix instead of oil and chip. Mr. Stein recommended for section IV that if the developer has not paved by the middle of November that the commission give the staff the authority to call the bond.

Mr. Ragsdale responded to the statement made by Mr. Martin concerning staking the bales. Mr. Ragsdale stated that the bales were not staked because he knew they would be working in this section and the bales would have to be moved and he saw no real reason to do so until the rainy season begins.

Mr. Stein asked Mr. Patterson when he plans to complete the roads in Temple Hills. Mr. Patterson reminded the commission that the roads are not under the new specifications and if the commission would work something out with him he would try to pave them all and cut the roads back to the original size that they were. Mr. Patterson said that this proposition has been made and asked for but he has never had a response to it. Mrs. Petersen responded, for the record, that she has never seen concrete evidence of the proposal in writing. Mrs. Wartell asked what the proposal was. Mr. Patterson responded by telling her that if he were allowed to leave the roads at the same width that they were approved under and not have to widen the roads that instead of oil and chip that it could be black topped. Mr. Ragsdale reported that they have paved three cul-de-sacs with two inches of black top at the beginning of this process and were going to pave all of section I as they could afford it. The results were that there was a push to go ahead and double penetrate all of the roads in section I and this was done about a year and a half ago, but the original proposal was as they could afford it they would put two inches of hot mix on all the roads in Temple Hills. It was also reported that the paving company, Sessions Paving, would be available in the next two or three weeks to start paving.

After a very lengthy discussion Leanore Wartell made a motion to extend the bond for section V for one month provided a signed savings account in the amount of \$13,000 is in our office by October 10, 1980 with a letter stating that if the work is not done we will immediately get the funds. Pete Mosley seconded the motion.

Mrs. Peterson brought up the condition of Temple Road, which serves the whole subdivision and it ought not be in the shape it is in. The bond amount for Temple Road was \$13,000 and was a personal check and when we called the bond and tried to collect the funds Mr. Patterson stopped payment on the check. Mrs. Petersen felt this was an example of what has been done out there.

Mr. Patterson told the commission that things have been about as bad as they could be in the past year and that he has kept the road patched to the best of his ability. He also told the commission that he had never made any promises to the commission as to when he would re-do Temple Road.

The above motion was then voted on with Dr. Robert Medaugh, Jack Meagher, Joe Baugh, Leanore Wartell and Pete Mosley voting in favor of the motion and Judge Kelley, Ann Petersen and Joey Davis voting against the motion. Motion carried with a vote of 5-3.

The bond for Section IV of Temple Hills is due 12/1/80. Staff recommended that if no work is accomplished on section IV by November 15 that the commission authorize the staff to call the bond. Action on Section IV was deferred until the first meeting in November.

ITEM VIII: CONSIDER ZONING RESOLUTION TO COMPLY WITH FEDERAL INSURANCE AGENCY REQUIREMENTS FOR FLOOD INSURANCE PROGRAM.

The resolution concerning requirements for flood insurance was presented to the County Commission a few months ago and this resolution was tabled because of questions pertaining to the amendments. Mr. Stein met with a few of the members of the Commission and the following was suggested.

- (1) Under "Definition" use the phrase "or some other study authorized and approved by the County Commission."
- (2) That the first floor elevation be lowered to one (1) foot for Non-Conforming Structures and that the definition be further defined so that it is understood that a house in the floodplain area that has a first floor elevation above the 100 year flood elevation is not considered in the floodplain. This means that they would not be required to supply a detailed engineering report to the Planning Commission for approval.

F.I.A. indicated that these changes would meet their regulations. They also stated that the following phrase should be added to the "Non-Conforming Use" paragraph, "No Mobile Home outside a Mobile Home Park destroyed in any manner shall be rebuilt in the floodway."

Staff recommended that the amendments be advertised to be heard in November by the County Commission and that we invite a representative of FIA to address the Planning and County Commission before the County Commission meets in November.

Motion was made by Ann Petersen to approve the resolution as amended and recommend this to the County Commission. Jack Meagher seconded the motion; motion carried.

ITEM IX: CONSIDER FINAL PLAT OF TWO LOT SUBDIVISION LOCATED ON NORTH CHAPEL ROAD AND PATE ROAD IN THE 14TH CIVIL DISTRICT SUBMITTED BY TONY CHAPDELAIN REPR-ESENTING RICHARD IRVIN. *WITHDRAWN*.

This item was withdrawn by Mr. Chapdelaine.

ITEM X: CONSIDER FOR APPROVAL THE SKETCH PLAN FOR THE TEMPLE HILLS ESTATES SUBDIVISION LOCATED OFF TEMPLE ROAD, SUBMITTED BY JIM PATTERSON AND ASSOCIATES.

Motion was made by Joey Davis that nothing be looked at until the \$13,500 check for Section III is taken care of. Pete Mosley seconded the motion. Motion failed with a vote of 4-5. The members voting no were Jack Meagher, Dr. Robert Medaugh, Ann Petersen, Judge Kelley, and Mitchell Beard. Those voting yes were Joey Davis, Pete Mosley, Leanore Wartell and Joe Baugh.

Mr. Ragsdale reported that the plat was approved in 1973 with a total of 676 acres. Out of 676 acres there was computed to be 736 dwelling units allowed. Mr. Stein read a letter from the members of the 1973 Planning Commission (see enclosure) concerning the Temple Hills Country Club Estates which was approved by the Commission with 736 dwelling units. Mr. Ragsdale felt it was necessary to go back to the people who reviewed the plan. A letter was presented to the commission from Mr. Bob Martin who was the county planner at that time (see enclosed letter).

In 1973 the developer came before the commission for approval of Section I and before the commission would approve section I it required that all Open Space be dedicated. An easement on 245 acres was dedicated to the County providing that the land would never be subdivided and remain open space (golf course). Mr. Ragsdale told the commission that the Natchez Trace Area is just as much part of the open space as any other area according to county regulations.

Mr. Ragsdale told the commission that the grade situation was known from the beginning and that there would be grades greater than 10% and in certain areas today that there are grades greater than 10%. The county regulations state that the county highway department and county planning commission have the authority to vary grades based on topography and concept of open space residential development.

Mr. Ragsdale contended that the preliminary site plan was presented and approved in 1973 and that it was revised every year or a new plat was in progress. In 1976 the owners lost control of the property because of financial problems and Mr. James Patterson, prospective buyer, wrote a letter to the Planning Commission asking how many units and lots existed in Temple Hills. Mr. Stein read the letter dated November 26, 1976 to Mr. Patterson from Tom Ragsdale, county planner at the time. The letter was in reference to the number of units allowed in Temple Hills Country Club Estates. The letter stated that: "The preliminary plat of Temple Hills Country Club Estates on file in the planning office indicates there are 736 housing units approved by the planning commission.

Our files also indicate no action has been taken on this overall preliminary plat since the summer of 1975".

Mr. Ragsdale reported that on March 22, 1978 Leon Stanford requested a letter asking for the dates of which some action had been taken on the plats. A letter was submitted to him listing nine different events on which it had been renewed or approved in some form or another.

On August 16, 1979 the Planning Commission renewed the plat for one year according to the 1979 regulations. That night Mr. Ragsdale told the commission that they stand under all their rights under the old plat. Following that time period on December 20, 1979 the commission told Mr. Ragsdale that if they had steep slopes on the back side of the property, that they should be very careful on how they would develop and that they may not be able to develop. The Planning Commission asked that the developer locate all 736 units. Mr. Ragsdale asks for a committee to be established to sit down and work with him. The committee reported to the Planning Commission that they had a generally acceptable plan for the northern end of the subdivision and are working on the south end. The developer provided the commission with 1/100 scale maps with two foot contours and anything and everything that they had access to. Mr. Ragsdale said they were finally down to a point where they worked out a design and the committee went to Temple Hills and showed the homeowners the total design that they had worked up. They separated the total acres, gave the total number of open space acres and the number of dwelling units and lots which was 286, area of future acres which is 129 and the take which was 18.5. There are allowable units for 236 and 212 that

is presently platted. Dwelling units detached are 264 and detached and attached town houses are 260.

There was further discussion concerning staff's recommendations (see enclosure). Also several homeowners of Temple Hills brought up the point of open space and the fact that there are no recreational facilities provided for the children.

The committee working with Mr. Ragsdale on the Temple Hills Subdivision did not agree with some of the recommendations of the staff. The committee recommended that the subdivision regulations be waived on the cul-de-sacs in excess of 1500 feet. Also they agreed that there was no way to meet the road grade regulations for it to be developed. The committee agreed that the proposal does not comply to the present zoning ordinance. Also the committee recommended waiving the 10% grade restrictions subject to review and approval by both the Planning Commission and Road Commission when road plans are submitted. They also recommended that appropriate legal action be taken on section III which was defaulted.

Motion was made by Ann Petersen to disapprove the plan as presented for the following reasons:

- (1) The plans do not comply with the density requirements of Williamson County- -there was no consideration given for taking out the property sold for the Natchez Trace Parkway, no consideration for taking out land for ten (10%) percent for roads and no consideration for taking out fifty (50%) percent of the land with slopes greater than twenty five (25%) percent.

- (2) That there are lots and areas shown to be developed on slopes of greater than twenty five (25%) percent.

Pete Mosley seconded the motion; motion carried. Mrs. Wartell voted against the motion.

Mr. Ragsdale requested a letter signed by the secretary stating which regulations are being used and where the Board of Appeals fits in the evaluation and interpretation of zoning regulations.

Due to the lateness of the hour Items XI and XII were postponed until the next planning commission meeting.

ITEM XIII: CONSIDER SETTING DATE TO AMEND SUBDIVISION REGULATIONS CONCERNING PROCEDURES FOR WAIVING AND RENEWAL OF BONDS.

Motion was made by Pete Mosley to set the date of the public hearing to amend the subdivision regulations concerning procedures for waiving and renewal of bonds on November 6, 1980. Joey Davis seconded the motion; motion carried.

With no further business to come before the commission the meeting was adjourned at 12:05.

/s/ Ann Petersen
Secretary

RESOLUTION FOR APPROVAL OF SUBMITTAL OF FEDERAL OR STATE FUNDS TO SERVE WILLIAMSON COUNTY'S WATER PROBLEMS

WHEREAS, Williamson County has suffered severe water problems in recent years; and,

WHEREAS, The Williamson County Board of County Commissioners has retained the consulting engineers of Harry Hendon and Associates to assess the County's water problems and to develop plans for meeting the County's current and future water needs; and,

WHEREAS, said engineers have recommended a water plant on the South Harpeth River; and,

WHEREAS, The Tennessee Division of Water Quality Control and the Farmer's Home Administration recognized that Williamson County is in great need of additional water; and,

WHEREAS, The County may receive grant and/or loan funds from the Farmer's Home Administration, State of Tennessee and/or HUD;

NOW, THEREFORE, BE IT RESOLVED, for the Williamson County Regional Planning Commission to endorse the submittal of a pre-application for grant and/or loan funds to build a water plant with necessary water lines on the South Harpeth River.

Ann Petersen, Secretary,
Williamson County Regional
Planning Commission

CROSS PROPERTIES

REAL ESTATE . LEASING . DEVELOPING

TELEPHONE
790-3700

114 THIRD AVENUE SOUTH
FRANKLIN, TENNESSEE 37064

October 2, 1980

Mr. Thayer Martin
County Engineer
Williamson County Courthouse
Franklin, Tennessee 37064

Re: Stonebrook Sections 1-5

Dear Thayer,

This letter is to notify you and the Planning Commission that Williamson Properties Ltd. will be requesting a conversion from the Performance Bond to the Maintenance Bond on Stonebrook Sections 1-3 this month. All unstabilized areas have been reseeded three times since the time of our last request to be placed under a Maintenance Bond, and areas that were hardest to stabilize have had blasted rock placed so as to facilitate stabilization.

I would like to remind you and the Planning Commission that we are at the 30% level which is the same bond amount required for the Maintenance Bond, and therefore the liability to Williamson Properties Ltd. would remain the same through the Maintenance period. We would then have a two-year period to take any further measures necessary to complete stabilization. By being placed under Maintenance, we would merely be beginning the two-year period now and hopefully shortening the total length of time that bonding would be necessary. By expediting this process, the County as well as the Developer, would be benefited.

Also, I plan to request a reduction in the Performance Bonds in Sections 4 & 5 in Stonebrook. However, I have

not requested a full reduction on work completed because I realize that the sewer and water have not been tested, a practice which is usually done when all lines are completed. All lines have not been completed because there are not lots sold in these sections, and it appears that it may be some time, because of the state of the housing market, before

Mr. Thayer Martin
October 2, 1980
Page Two

many lots are sold. For the reasons mentioned above, I do feel like the partial reduction that is requested is justified on Sections 4 & 5.

Per your request, we are placing straw bales across the road going into Section 4 to prevent siltation into the lower sections.

If you have any further questions concerning our efforts in this subdivision, or if you have any suggestions, please do not hesitate to call.

Sincerely,

/s/ Gerald G. Bucy, P.E.
Project Manager

GGB:hb

SOUTHWINDS DEVELOPMENT
AND
CONSTRUCTION, INC.

1108 Battlewood Street Franklin, Tennessee 37064
October 2, 1980

Mr. Morton Stein
Williamson County Planner
Williamson County
Planning Commission
Public Square
Franklin, TN 37064

Dear Mr. Stein:

I would like to propose the following steps to fulfill my responsibility on the five hundred and sixty foot road of Settlers Point.

Firstly, I would like to furnish the commissin with a new letter of credit for the sum of \$19,000.00. Secondly, I would propose to pave Settlers Court in May or June of 1981. This will give us time to get an 80% completion of construction and I would then like to pave both base and final at the same time. My ditches have been stabilized to a good extent.

I believe that this would be the best way to complete my responsibility to you and the county. I have discussed this with some of the home owners and they seem pleased with the prospect of both finishing up the construction most of the way and having the road paved to a finished coat.

Thanking you in advance for your consideration.

Yours very truly,
/s/ Bill Eason

BE/sm

Telephone (615) 794-9487

September 30, 1980

Williamson County Regional Planning Comm.
Williamson County Courthouse
Franklin, Tn 37064

Dear Mr. Chairman:

We the undersigned members of the 1973 Williamson County Planning Commission, desire to set the records straight concerning the approval of Temple Hills Country Club Estates. On May 31, 1973, Temple Hills Country Club

Estates was approved by the Commission. The development consisted of 676 acres and was approved for 736 dwelling units. At the time of approval this development met all county requirements.

/s/ Robert Moran
Chairman

/s/ John Mason

/s/ (Illegible)

/s/ (Illegible)

/s/ (Illegible)

/s/ Thomas Helm

September 29, 1980

505 Fair Street
Franklin, Tennessee 37064

Mr. J. T. Ragsdale, M. S. P.
Box 189
Bellevue, Tennessee 37221

In re: Temple Hills Country Club Estates

Dear Tom:

I was a principal planner with the Tennessee State Planning Office, Local Planning Division, Middle Tennessee Section, from February, 1973 through August, 1974. Williamson County was one of my contract areas for this entire time period.

One of my responsibilities was to make recommendations on agenda items presented to the Williamson County Regional Planning Commission. Temple Hills Country Club Estates was presented as one of those items, which actually began before I commenced working with the Commission. I worked on the sketch plan with the engineer on the

project, Mr. Lytle Brown. Mr. Brown and I eventually agreed that 736 dwelling units would be permitted on 676 acres. I also recommended that Mr. Brown place the dwelling unit figure on the sketch plan. As final plats were presented to the Commission and approved, the approved lots would be subtracted from the total dwelling unit figure. This would eliminate any disagreement in the future as to the number of dwelling units remaining to be approved. To the best of my knowledge, Mr. Brown told the Commission that it would be anticipated that the project would contain an undetermined number of multiple family dwelling units, which, of course, would not exceed the remaining permitted total dwelling units. He said that he would rather have the Commission consider the specific multiple family dwelling unit sites as the planning for the project progressed. The Commission approved the sketch plan on May 3, 1973.

When I may be of further assistance, please call on me.

Sincerely,

/s/ Bob Martin
City Planner

RM/rm

Recommendations

Disapprove the sketch plan for Temple Hills Subdivision for the following reasons:

1. The proposal does not comply with the density requirements of the zoning resolution of the County. We estimate that based on losing 18.5 acres for the Natchez Trace take, loss of 65.75 acres for the 10% of Road and loss of 50% of area with slopes greater than 25% that the maximum number of units would be 548.

2. There are two cul-de-sacs that are in excess of the subdivision regulations concerning the length of cul-de-sacs. (Regulations require maximum length of 1500 feet—Canterbury is about 5000 feet in length and Road A,B,C is over 3000 feet.)
3. There are road grades in excess of the Williamson County Road Regulations maximum grade requirements.
4. There are lots to be developed on land that is in excess of twenty five per cent (25%) grades.
5. The developer has defaulted on Section III and Temple Road which is the main access road for the development, cannot handle the traffic generated by the proposed development and Sections IV and V have gone through three paving seasons with only partial paving.
6. There are inadequate services to provide fire protection for the multi-family units proposed for this development. Also, there are no recreational facilities and open space provided for children and residents in the areas for Multi-family housing. (The only open space is limited to members of the Country Club.)
7. The lots do not meet the minimum size ($\frac{1}{2}$ acre) and road frontage (125) of our subdivision regulations.

The Temple Hills Planning Committee recommends that the Subdivision Regulations be waived on the cul-de-sacs in excess of 1500 feet.

The Temple Hills Planning Committee recommends waiving the 10% grade restriction subject to review and approval by both the Planning Commission and Road Commission when road plans are submitted.

The Temple Hills Planning Committee recommends that item 7 above be eliminated as a condition.

Action Taken:

MINUTES OF THE MEETING
OF THE
WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION

SEPTEMBER 18, 1980

Members Present:

Leanore Wartell
Jack Meagher
Pete Mosley
Judge Wilburn H. Kelley
Dr. Robert Medaugh
Ann Petersen

Staff Present:

Morton Stein, County Planner
Thayer Martin, County Engineer
Tommy Watson, Assistant Building Commissioner

The meeting of the Williamson County Regional Planning Commission was called to order by Ann Petersen at 7:40 p.m.

The commission then considered the minutes of the September 4, 1980 meeting. On page one under Old Business, concerning the bond for Temple Hills, the motion was made by Leanore Wartell instructing Mr. Stein to collect the money if he does not have it in hand by 12:00 noon September 9. Mrs. Petersen asked that the word "money" be changed to "surety".

Motion was made by Judge Kelley to approve the minutes of the September 4, 1980 meeting as corrected. Pete Mosley seconded the motion; motion carried.

Announcements:

Mr. Stein announced that the committee that is studying the plan of Temple Hills will meet at 7:00 p.m. Sept.

22 with the homeowners of Temple Hills at the Country Club so the plan can be reviewed by the people who live out there. Mrs. Petersen suggested contacting the County Commissioners and letting them know about the meeting also.

Mr. Martin advised the commission that the developers of Breckenridge have submitted plans for the roadway and water for review of section 3. He stated that they are basically ready for the compaction test on the sub-base and then plan to put the gravel down this year. The developers are taking certain procedures for an erosion control plan to prevent excessive erosion during the winter. Mr. Martin also asked them to submit a water letter because there was some confusion as to whether or not all the conditions had been met in the original approval. The developers have agreed to send another water letter from the Utility District and also a hydraulic analysis of this system to make sure there will be no problems in the rest of the system. Mr. Martin suggested that the hydraulic analysis be handled by Stan Nelson the same way as compaction tests are handled by Pittsburg Testing; that is the developer requests a hydraulic analysis and agrees to pay for same, County Engineer authorizes consultant to prepare same, consultant transmits results and invoice to County Engineer and County Engineer transmits results and invoice to developer, developer remits payment to County and County to consultant. The commission thought this was a good idea and had no objections.

Plans were submitted to Mr. Martin for a proposed bridge by Mr. Butler who is the developer for Deerwood Subdivision (see enclosed plan). They would like to tie into Kingsberry Drive which is in Williamson County. Mr. Martin has requested certain information and checked with the Corps of Engineers and will not give any approval until the commission has been advised of any potential flooding problems and other engineer designs have been checked. Mr. Martin talked to Mr. Larry Blick, City Manager of Brentwood, and he is agreeable to this project being built if there are no problems and it is at the developers expense.

Old Business:

Mr. Stein reported that the bank has extended the bond for the Temple Hills Subdivision for one month. He reminded the commission members that the paving season ends October 1, 1980 and Temple Hills Section IV & V will be placed on the next agenda for discussion in terms of how to proceed with this subdivision. Mrs. Petersen suggested sending a letter to the developer reminding him that the paving season is soon going to end and the problems that have been extended in the past, possibly, will not be extended again. Motion was made by Pete Mosley to send a letter to the developer of Temple Hills and the Hamilton Bank making them aware that the paving season will soon end. Jack Meagher seconded the motion; motion carried.

Mr. Stein told the commission that the resolution for the floodplain was tabled by the County Commission until October 4. The main question of this resolution was in the area of the non-conforming use. The principle objection was the fact that if someone's house located in the floodplain burned or flooded and was destroyed they would have to perform engineering data and build their house out of the floodplain elevation. Some County Commissioners thought this would be an unnecessary burden on the people. Judge Kelley stated that the vote was close but there was some confusion so one of the commissioners made a motion to table it.

Judge Kelley announced that Mr. Joe Bowman, Building Commissioner and Tommy Watson, Assistant Building Commissioner are resigning. Mr. Stein was asked to issue building permits on a temporary basis and he indicated that he will help all he can. Judge Kelley suggested that maybe this was a good time to establish a codes department.

The Planning Commission had asked the staff to look into the situation of subpoenaing a witness for a court trial. It was the county attorneys opinion that if an expert witness is subpoenaed or asked to testify in court that we have to pay them.

ITEM I: CONSIDER PERFORMANCE BOND FOR THE HIDDEN VALLEY SUBDIVISION LOCATED OFF BERRYS CHAPEL ROAD IN THE 7TH CIVIL DISTRICT. *EXTENDED.*

Mr. Martin and Mr. Hatcher made a construction cost estimate of what it would cost to bring the roads up to date and in a condition where they would be acceptable. The estimated cost would be \$60,700. Mr. Martin reported that the developer had three options at this time. The bond could be increased to \$60,700 or the developer could improve Hidden Valley Road and provide a new bond in the neighborhood of \$28,000, or the bond could be called.

Staff recommended extending the bond for one month so that Mr. Stadler can get a legal opinion from his attorney. Motion was made by Dr. Robert Medaugh to grant a one month extension for the Hidden Valley Subdivision. Leanore Wartell seconded the motion; motion carried.

Motion was made by Judge Kelley authorizing Mr. Stein to go after the surety September 25, 1980 if the letter of credit extending the bond for one month is not in the Planning Office by 12:00 noon. Also the staff should send a letter to the bank holding the surety putting them on notice. Leanore Wartell seconded the motion; motion carried.

ITEM II: CONSIDER PERFORMANCE BONDS FOR THE SPRINGVIEW SUBDIVISION LOCATED OFF TOM ROBINSON ROAD IN THE 10TH CIVIL DISTRICT. *DEFERRED.*

Staff reported that Mr. Smithson was scheduled to pave on September 2, but was unable to because of rain. Staff recommended that since the bond is not due until October 16, that the planning commission take no action at this time but if they are not putting down paving by the next meeting that severe action will be taken. Motion was made by Leanore Wartell to defer action for Springview Subdivision until the October 4, 1980 meeting. Judge Kelley seconded the motion; motion carried.

PLAINTIFFS EXHIBIT 2524

A G E N D A

BOARD OF ZONING APPEALS

NOVEMBER 11, 1980

7:30 p.m.

- I. Consider granting a variance for the front yard setback of Lot 11, Oakwood Estates, zoned Residential A in the 10th Civil District. This request was made by William A. Brakebill.
- II. Consider request for variances for the front setback for all lots of Oakwood Subdivision Sections I, II, III, IV (approximately 24 lots) zoned Residential A in the 10th Civil. This request was made by Tower Real Estate.
- III. Consider the request for an interpretation of the zoning code pertaining to trailers set on permanent foundations and the request to place a trailer on the west side of Nashville Pike on Mrs. James I. Pewitt property.
- IV. Consider request that the building commissioner issue permits for two lots on Old Hillsboro Road (Tract 3A & 3B) zoned Agricultural. This request was made by Ed Boguskie and is located in Montpier Farms.
- V. Consider the request for an interpretation of the Residential Cluster zoning as it relates to Temple Hills Country Club Estates. This request was made by J.T. Patterson

M I N U T E S

BOARD OF ZONING APPEALS

NOVEMBER 11, 1980

The Williamson County Board of Zoning Appeals met in regular session on November 11, 1980 at 7:30 p.m. in the

Williamson County Courthouse. The following members were present: Gayle Moyer, Joey Davis, E.A. Jagers, Harry Sanders and Pete Davis. Also present was staff representative Morton Stein, County Planner and County Attorney Mitchell Crawford.

The Board considered the minutes of the October 7, 1980 meeting. Motion was made by Gayle Moyer to approve the minutes of the October 7, 1980 meeting. Joey Davis seconded the motion; motion carried.

The first two items on the agenda was a request made by William A. Brakebill for a variance to the front yard set back of lot 11, Oakwood Estates and a request made by Tower Real Estate, represented by Gerald Bucy, for a variance for the front setback of all remaining lots of Oakwood Subdivision Sections I, II, III and IV (approximately 24 lots) zoned Residential A in the 10th Civil District. Sections I through IV were approved before 1977 when this area was zoned Residential A with fifty (50) foot setbacks. This development is almost complete and the rest of the houses have fifty (50) foot setbacks. Mrs. Moyer asked if it was necessary to grant a setback variance for a plat that was recorded prior to being zoned Residential A. Mr. Crawford's opinion was that if this plat was recorded before the new zoning law was passed that this plat would be controlling. Mr. Stein stated that the zoning law did not specifically say that other lots were exempt and therefore the zoning law is prevalent over the plat. Mrs. Moyer explained that she wasn't sure whether there was anything the Board could do to force the developer to meet today's setback requirements. Mr. Stein felt that the variance was needed to be granted in this case

because it does not comply with present zoning. Mrs. Moyer stated that the present zoning is not applicable to the zoning that this subdivision was approved under.

Mr. Crawford explained that it may be desirable for the owners of lots or the developer to have the Board grant the variances so that the mortgage lender or the title insurance company will not have any questions. Several Board members felt that as long as this plat is registered and recorded showing fifty (50) foot setbacks that there was really no need for anyone to question it.

Motion was made by Gayle Moyer that items I and II on the agenda needed no action by the Board of Appeals and when a lot on a recorded plat meets the front setbacks that existed under the zoning regulations at the time the plat was finalized that if the zoning law changes then it still comes under the recorded plat setbacks. Motion was seconded by Mr. Jaggers; motion carried.

Item III was a request for an interpretation of the zoning code pertaining to trailers set on permanent foundations and the request to place a trailer on the west side of Nashville Pike on Mrs. James I. Pewitts property. Mr. Stein explained that Mrs. Pewitt has approximately fifteen (15) acres and would like to place a trailer on her property for protection because she lives alone and has been burglarized twice. The property is zoned Residential A and a petition was signed by all the adjoining property owners stating they were aware that Mrs. Pewitt was requesting to place a trailer on her property and have no objections. (See Enclosed Petition).

Mr. Jim Dunn, manager of the Milcrofton Utility District, would be living in the trailer. He is presently living in east Nashville because he has been unable to find living quarters in the District.

There was a lengthy discussion as to whether the mobile home would be used for a use incidental to the agricultural use. Mrs. Pewitt stated that Mr. Dunn worked full time and thus there would be little or no actual farming. Mr. Stein pointed out that the zoning ordinance states that the Board of Appeals shall also have the power to permit mobile homes on a temporary basis of no longer than six (6) months with no more than one renewal and no change of location. This would give Mr. Dunn time to locate other living quarters in the county. Motion was made by Joey Davis to grant a six month permit with the possibility of a six month extension so Mrs. Pewitt can place a trailer on her property in a residential A Zone. Motion was seconded by Mr. Jaggers; motion carried.

The next item was a request made by Mr. Ed Boguskie requesting that the building commissioner issue permits for two lots on Old Hillsboro Road (Tract 3A and 3B) zoned Agricultural. Mr. Boguskie explained that they have a five (5) acre tract that faces on Old Hillsboro Road. This property was purchased in 1978 and he decided he would like to try and split one tract. He talked to Mr. Bowman and Mr. Ragsdale and the County Health Department. Mr. Boguskie was given certain specifics to follow which included having 100 feet of road frontage and the Health Department told them they needed to go to an outside source to have the property perked. After these things were accomplished Mr. Boguskie took a plat to Mr. Ragsdale, which was approved. The Health Department gave him a permit for the subsurface disposal system, which he had in his possession. Mr. Boguskie explained

that when the permits expired he tore them up and threw them away.

Mr. Boguskie has now decided to auction the property off but they ran into a problem. When he came into Mr. Stein's office he found that he was illegally subdividing the property. It seems there is no problem with the other tract and Mr. Boguskie assumed that a permit can be issued for it. It was also pointed out that this property had never been recorded.

There was a lengthy discussion concerning this item and the Board told Mr. Boguskie that they do not have the authority to make the Building Commissioner issue permits in this instance and no action was taken.

Item IV was a request by J.T. Patterson, represented by Tom Ragsdale, for an interpretation of the Residential Cluster zoning as it relates to the Temple Hills Country Club Estates. Before Mr. Ragsdale gave this presentation, Mrs. Moyer stated that she would like to have the issues defined that are being addressed so they will know the questions they are seeking to answer and be sure that everything that is being addressed tonight is limited to those issues because there are a lot of things that have transpired between the County and Temple Hills.

Mr. Ragsdale explained the issues to the Board members. The first issue was which regulations Temple Hills actually fall under — the 1973 zoning regulations or the 1977 zoning regulations. Second, the portion within the zoning regulations that discusses analysis of slope, (page 27 -- both sets of regs), Mr. Ragsdale wanted to discuss how this is computed. The third issue was dealing with the 18.5 acres of land that was taken by the State and

Federal Government. Mr. Ragsdale requested that the Board take these issues one at a time so there will be no confusion.

Mr. Ragsdale presented excerpts from "The County Plan" to each Board member (see enclosure). He explained that he had taken the liberty of underlining areas that he feels pertinent and how they relate to Temple Hills and how the plan relates to zoning. The first element is on page eleven (11) of the 1973 plan. The portion concerning High Density was broken down into short simple statements by Mr. Ragsdale and it states: "High density should be in the northern part of the County, where the county services, such as water and sewer, are available and economically made available."

On page 14 the portion concerning water and sewer were underlined which states: "Site for sewage treatment should be located at points where such systems can tie into regional systems."

Mr. Ragsdale stated that Temple Hills is located off Sneed Road and has been tied into a regional system which is the Harpeth Valley system. To give an idea of how expensive that was, in 1974 there was a half million dollars spent on water and sewer lines that ran from Temple Hills to Highway 100 where pump stations were put in to beef up the water lines in that area. The plan goes on to encourage developers to install self contained sewerage treatment facilities in developments where such systems are feasible.

The next area for discussion was on page 12 concerning cluster housing and condominiums and Mr. Ragsdale pointed out that it discusses the varied life styles of dif-

ferent individuals and what they would like to have as far as imaginative planning, but it also points out that providing county services are more economical, and allow for the preservation of historic and scenic sites and recreational facilities and there should, of course, be minimum open space requirements in such developments. Again, Mr. Ragsdale wanted to point out that Temple Hills has all the services that can be required and are required and do exist in the development and have dedicated through an easement to the County a minimum of 245 acres that was done prior to recording of the first plat in 1973.

On page 16 under Fire Protection Mr. Ragsdale said that it simply states: "The County should negotiate with municipalities having fire departments and private fire departments for those departments to serve residents in outlying areas." Mr. Ragsdale stated that they have fire plugs well above the state and county requirements, they have lines well above those sized. He said that Temple Hills has two types of fire plugs, one is 2½ blow-offs which can be used by fire service on certain occasions and they have a standard large type in the latest section.

On page 18 it talks about Electrical Wiring and the ordinance states: "To improve the scenic quality of subdivisions, all electrical wiring and telephone lines should be laid underground." Mr. Ragsdale stated that this has been done also and that obviously this amounts to a great deal of money. He also pointed out that the county plan and the zoning ordinance are side by side and that the zoning ordinance should be used to accomplish what the plan is looking for.

Mr. Ragsdale reported that in the case of Temple Hills, the cluster residential zone that the County Court

created, required the majority of all the elements which have been stated in the plan and within these elements they were required sewers, water lines, street requirements, etc., and Temple Hills was approved, River Rest was approved, Cottonwood was approved and many more were approved under different zones, but with these particular guidelines.

Mr. Ragsdale reported that he had been before the planning commission (Oct. 2, 1980) and asked that the preliminary sketch plan be approved so that they could continue to develop Temple Hills, but they ran into several problems. A series of different letters and minutes were compiled by Mr. Ragsdale (see enclosed). The first minutes were May 1973 and Mr. Ragsdale reported that basically the Planning Commission approved the initial sketch plan of Temple Hills under 1973 regulations that existed at that time. The next item is the staff report which basically reviewed what happened at the Planning Commission meeting that night. It states that the Planning Commission approved a revised plat, saying there was reserved land for future development of condominiums and other uses and definite provisions for density, and continues to say that preliminary approval was granted.

On November 26, 1976, Mr. Ragsdale reported that Mr. Jim Patterson asked him to write a letter as to what existed at the time, and the enclosed letter stated that the preliminary was approved and on file in the planning office.

On March 22, 1978 a letter was sent to Mr. Ragsdale from Leon Stanford requesting how many times the Plan-

ning Commission had approved or dealt with the plan. (see enclosed letter).

The next enclosure was a letter to Mr. Joe Hunt, who had requested the total dwelling units and how many acres was in Temple Hills.

Mr. Ragsdale explained that in 1979 he came to Mr. Stein and the Planning Commission and they were working on an acquisition and development grant from HUD, and to get federal funding you have to go through the A-95 process. Mr. Ragsdale reported that their plan was submitted to Mr. Stein and the Planning Commission and the response was that this development is in conformance with the Williamson County Plan adopted in 1973 (see enclosed letter to Mid-Cumberland Council of Governments from Mr. Stein). Mr. Ragsdale noted that the date of this letter was June 7, 1979 and the point that he wanted to emphasize in this particular letter was that the Planning Commission and Mr. Stein approved Temple Hills in conformance with the plan adopted in 1973.

Mr. Ragsdale had asked Mr. Bob Martin (County Planner in 1973-74) to write a letter in reviewing what he remembered as planner at the time. (see enclosed.)

Also enclosed is a petition dated September 30, 1980, signed by the Planning Commission members during 1973 which were John Moran, chairman, Vance Little, Harry Sanders, Thomas Helm and Jim Crawford. This petition stated that Temple Hills Country Club Estates was approved by the Commission on May 3, 1973.

Mr. Ragsdale explained that in 1973 the Planning Commission adopted cluster zoning and Temple Hills was

the first to be adopted under that zoning and it was approved time and time again all the way up to 1979. In 1977 the County Court and the Planning Commission established a new zone and they changed the name of cluster development to open space residential. He explained how this was done and asked the Board members to turn to pages 48 and 49 of the zoning code. What they tried to do was block all the zones that existed at that time that were on the map. Mr. Ragsdale explained that the problem during that time period was that the cluster was so new that it was not handled right when it was first put on the map. The board members were asked to look at page 47 Zoning District Identification and page 49 Key to interpret the old zoning item numbers to new zoning item numbers. (enclosed). Mr. Ragsdale showed one of the original zoning maps and explained that cluster was an add-on and it just shows the areas in blocks. On page 49 numbers 57, 58, 59 and 60 have blanks beside them and Tom explained that they tried to pay special attention to the fact that this had happened.

Mr. Ragsdale stated that the Planning Commission and the County Court took no action what-so-ever to adjust the Temple Hills design during this time period and on page 29 of the zoning ordinance it states:

12. *Application* — This provision shall apply to all zones in which residential uses are permitted as designated and defined by this Zoning Resolution. Provided, however, every open space residential development shall be approved by the Williamson County Quarterly Court.

Mr. Ragsdale stated that the County Court (May 1977) did approve those four zones; it did approve Temple

Hills by reference to number, book and page; and that the open space residential development was approved by the County Court as it was designed under 1973 regulations. Also, the Planning Commission knew they were having problems with zones when they adopted the zoning resolution and map.

The Board members were asked to look on page 1 Article II — *Non-Conforming Uses* which states: 1. *Purpose* — With the adoption of this Zoning Resolution and Zoning Map there will be non-conforming uses within the various zones in Williamson County. It is the intent of this Section to permit the continuance of such non-conforming uses, at the same time limiting their enlargement and prohibiting their re-establishment after their discontinuance.

In Mr. Ragsdale's opinion based on page 20 section 12, page 47, maps at that time and the present time that have been shown tonight and the provision on page 1, Temple Hills is in fact a non-conforming use and it comes under the 1973 regulations because the County Court knew that Temple Hills existed before other clusters existed and accepted them by reference and therefore fall under the 1973 regulations. Also, Mr. Ragsdale pointed out that after 1977 when the ordinance was passed, Temple Hills was renewed twice in 1977 and 1978 under the 1973 regulations.

Mrs. Moyer asked under the adoption of the 1977 zoning ordinance by the County Court, how was this accomplished and how does Temple Hills fit in?

Mr. Ragsdale responded that they did not want to reconstruct a new map at that time, so they established the

difference and then adjusted the numbers. He explained that the number at the bottom of the map lets you research the items.

Assuming there is a boundary problem, you go by this item right back to the description. In the case of restrictive covenants, our deeds are recorded, our open space is recorded and in this case the only thing we had to tie this into it was the restrictive covenants we had at the time, because the plats were on file.

Mr. Stein asked if the number of lots were in the restrictive covenants. Mr. Ragsdale stated that the number of lots were on the plat but were not indicated in the restrictive covenants.

Mr. Ragsdale read a letter dated June 19, 1973 from I. Vance Berry to Mr. Callicott which said: "It has occurred to me after our discussions Tuesday morning that the records in the office of the County Clerk in Franklin, should perhaps include, as in your records now, a copy of the Temple Hills Preliminary Plan which was approved by the Williamson County Planning Commission at its May 3 meeting. You will recall that the plan was filed at that time, but apparently was taken away by the State Engineer. In order to document the fact of filing, it is my thought that the plan itself should appear both in your files and in the duplicate records maintained in the Clerk's office. With this thought in mind, I hand you two additional copies of the Preliminary Plan, with the request that you, as Secretary of the Commission, transmit at least one of these to the Clerk to be lodged with his copy of the minutes of the meeting. I shall greatly appreciate your other kindnesses and courtesies to me in this entire transaction."

Mr. Ragsdale reported that on research in the County Clerk's office there is no record of this and the only record he knew of other than the Planning Commission record is the actual adoption of the ordinance, which by record, relates directly to Temple Hills and all other clusters, in this case 10, 210, 219, 64 and 47, which were keyed so a description of every piece of property would not have to be given at that time. On the map that was printed in the newspaper it showed this very map with each number identifying each cluster. Mr. Ragsdale stated that what he is saying is, by records, the Planning Commission had this at their disposal, the County Clerk had it and the County Court knew exactly what they were doing in 1977. In fact it was brought before the County Court twice and was reviewed in great detail.

Mrs. Moyer asked what the map with the number on it was supposed to indicate. Mr. Ragsdale explained that you go to the map (what ever number it is) and you go to the index file to find out what it is, what book it is located in and on what page it is located. Mrs. Moyer asked how would the map that was adopted with the number on it relate to Temple Hills coming under the 1973 regulations or the 1977 regulations. Tom stated that in this case, as shown on the map, Temple Hills was not numbered at all. What happened was it was numbered and indicated it was an open space residential development. On page 29 it says, "every open space residential development shall be approved by the Williamson County Quarterly Court." Tom explained that Temple Hills was approved as it was, with no changes, under the old regulations. He then pointed out that on page 1 it says there will be non-conforming uses within the various zones in Williamson County. It

is the intent of this section to permit the continuance of such non-conforming uses, at the same time limiting their enlargement and prohibiting their re-establishment after their discontinuance. Mrs. (sic) Ragsdale pointed out that the County Court knew there would be non-conforming uses and that is why these provisions were put in, to protect the vested rights of the individuals that already had gotten approval at that time.

Mr. Crawford, county attorney, asked if that was the intent, why wasn't it specifically stated, rather than as Mr. Ragsdale suggested in his argument that it was done by omission—why not spell it out? Tom stated that none of the other zones were done that way, they were all done by omission. Mr. Sanders told the Board that the whole County had been done that way, there were non-conforming uses all over the county and this was the reason it was put in there. He also said that he was familiar with everything and sees no error in anything Tom has said, and that this regulation covers it. He said that he sees no reason to write in that Temple Hills or Earlys Honey Stand or Ben Garys or any of the others that were non-conforming uses were included in this. All non-conforming uses were included at the time of approval and are covered by this.

Mr. Stein pointed out that on page 2 under the non-conforming uses *Provisions for the Continuing*—it states: "The adoption of this zoning resolution and zoning map by the Williamson County Quarterly Court shall in no way be deemed to prohibit the continuance and non-conforming use of a structure or land within any zone, provided, however, such continuance shall be subject to the

following limitations." Mr. Stein said it further states: "*Limitation on Expansion*—Any structure being used for a non-conforming use may not be enlarged by more, than twenty-five percent (25%) of its floor space or area within which the non-conforming use is carried on at the enactment of this zoning resolution. This provision shall not be construed as prohibiting ordinary repairs and maintenance."

Mrs. Moyer said that she felt that none of these limitations are applicable and that she is missing the point of why this was brought up.

Mr. Stein stated that the point is that the intent of this section is to permit the continuance of such non-conforming uses; and at the same time limiting their enlargement and prohibiting their enlargement and prohibiting their re-establishment after their discontinuance. Then the ordinance gives the Provisions for Continuing and none of these provisions are in there.

Mrs. Moyer asked if there was any problem with the information presented about the Planning Commissions approval in 1973. Mr. Stein stated that there were some questions because of notes on the plat, which read:

"Allowable Dwelling Units for Total Development" 763

"Allowable Dwelling Units Exclusive of Reserved
Parcels" 597

"Allowable Dwelling Units Presented this Initial
Sketch Plan" 469

"Allowable Dwelling Units for Future Development" 267

"Parcels with note: This parcel not to be developed until approved by Planning Commission not a part of this plat and not included in gross area."

Mr. Stein said that under the code in both the 1973 and 1977 code it says very clearly what a preliminary sketch plan would require: "A preliminary site of a scale of one inch to one hundred feet must be submitted to the Williamson County Regional Planning Commission. The preliminary site plan shall provide the following information: boundaries and acreage to the site, number of dwelling units of basic designs, arrangement of streets, structures and lots. Mr. Stein said that the point is that this site plan, which is required, in 1977 could not have been approved by the County Court because the site plan very specifically says that arrangements of streets, structures and lots, only 469 lots and 38 condominium units were presented in 1977, this was the only thing on file at that time and in Mr. Stein's opinion that is the only thing the County Court approved. Mr. Stein stated that yes, he admits it was zoned open space residential but, in 1973 all the regulations required was that the Planning Commission approve the site plan but it says in the present regulations that every open space residential development shall be approved by the Williamson County Quarterly Court. In other words they wanted to look at the site plan with said arrangements of streets, structures and lots. Mr. Ragsdale stated that they had that option, the Planning Commission had that option, at that time and they did in fact do that, and by approval by the majority of the County Court they enacted that resolution, that map and every plat and map that is in the planning commission office that is on that regulation is valid. Mr. Ragsdale stated that

they are not here to argue the number of units, or the number of acres, what he is saying is that Temple Hills comes under the 1973 regulations and the way the 1973 regulations evaluates and determines density. Mrs. Moyer stated that is why we are asking why the number of units were critical as far as the notes, does this mean that whatever changes were made to show the number of lots are going to have to meet the new subdivision regulations? Mort explained that from what he understands from talking to Mr. Brown, who was the designer, they had some problems and wanted to wait until the future to see how these problems could be settled.

Mrs. Moyer asked Mr. Ragsdale if he is asking for anything more than the 736 units that were approved in 1973? Tom told the Board no, he was not asking for anything more. Mrs. Moyer said that she sees no problems with expansion if he is not asking for anything more than what was approved in 1973.

Mrs. Petersen, secretary of the planning commission, came before the board and stated that the only thing she would like to disagree with was in the zoning ordinance where it talked about the page and number in 1977, the only thing that is in that book are open space and restrictive covenants, there is no map. Tom responded by saying that this is the reason he stated that the map is located in the files of the Planning Commission and that is why he read the letter from Mr. Berry to Mr. Callicott, they talked about the maps and they were given to Mr. Callicott but for some reason they were not recorded.

Mr. Stein said that the way he understands the non-conforming use, it refers to a use for instance, condominiums,

multi-family or any other business. Only 212 units out of the original 469 units that were originally approved, they have not even reached their full development to establish a basis for saying they are a non-conforming use. Mr. Stein said the point is the use is still there, what we are debating is the number of units that is actually going to be determined in this case. What we are saying in our argument is that because the developer has not established through a continuous development of the subdivision since 1973, and since the County Court had not changed the zoning law, the developers of Temple Hills had sufficient time to complete it before it was changed in 1977. The point that Mr. Stein made was that no action of the Planning Commission or the County Court caused the developers not to develop Temple Hills; they could have possibly submitted a plan as outlined very specifically in the code showing the streets and lots and gotten it approved at that point, but they did not submit a plan. The only plan that was approved was the 469 lots plus 38 condominiums, this was the only thing that was shown as designated by the code and the County Commission when they reviewed it in 1977. Mr. Stein said that he could not possibly see how they could take the position of being a non-conforming use. We are not saying for them to discontinue their use, we are saying yes you can use it as open space residential, all we are saying is that use has to follow the existing regulations.

Mr. Ragsdale stated that the use that exists is a residential cluster, the new zone is open space residential, which is a different zone. We were approved as a residential cluster, it is a use and is non-conforming, the provisions right here address it to that. We are not speaking

about the number of acres, we say we come under the 1973 zone and under this provision and we would like for the Board to rule on that.

Mr. Stein responded by saying that they are essentially the same zone and they essentially allow the same uses, the only change is the density requirements and the planning commission and County Court deemed it necessary to change it.

Mr. Ragsdale stated that they are tied into the 1973 regulations and they are not asking for anything else but to follow the non-conforming use, item 12 of the regulations and the fact that we were approved in 1977, 1978 and 1979 and we were in good shape until 1980.

Mrs. Moyer stated that she can see both sides of the arguments and both have good basis but this is a very difficult decision.

Mr. Sanders pointed out that the question before the board at this time is - does this come under the 1973 regulations or the 1977 regulations.

Motion was made by Mr. Sanders that this plat comes under the 1973 regulations. Ed Jagers seconded the motion; motion carried.

The next question discussed concerned the slopes in the Temple Hills Subdivision. Mr. Ragsdale reported that in 1973 the sketch plat was submitted to the Planning Commission on a 1/200 scale and it has contour intervals of 20 feet. Also submitted at that time was the plan on a 1/100 scale at 2 foot contours. There is a question of grades in the Temple Hills Subdivision and Mr. Ragsdale said when he met with Mr. Stein and the County Engineer there was a very big problem of how you compute grades. Mr. Rags-

dale stated that the Planning Commission knew what grades were existing at the time, which were computed by the average slope method from the top of the hill to the bottom and take the difference in elevation and divide it by the distance. Mr. Ragsdale said that he contacted several different people to see how they would calculate these slopes. He talked to Mr. Ron Cooper, State Planner, and he indicated he uses the average slope method but he added several things such as drainage configuration. Mr. Stein stated that there probably wouldn't be a hill in Williamson County that would be greater than 25% slope if that technique was used. Mr. Stein talked to Mr. Lyle Brown, the original designer of the development, and he told Mr. Stein that they did have problems with slopes. The County Engineer calculated the slopes over 25% and there were between 80 and 90 acres that were over 25% and Mr. Brown said that this sounded about right.

Mrs. Moyer asked if the Board is supposed to determine which engineering technique is to be used. Mr. Crawford stated that it was his opinion that this Board does not interpret the Zoning Code based on the kind of request it has had.

Motion was made by Mr. Jagers for the definition of the slope be defined in percentage as the length of the lot divided into the rise of the lot and will not exceed 25%. Motion was seconded by Harry Sanders. Motion carried with a vote of 3-2.

Mr. Ragsdale explained that this development started with 676 acres and the Federal Government took 18.5 acres of land, which is not part of the road way but will be a park area. The Planning Commission told the developer that they had to pull this 18.5 acres out of the subdivision

but the developers contend that this follows the regulations as open space and is not required to be deeded to anyone and that it should be left in the total concept of Temple Hills.

Mr. Stein reported that the owners of the property (The Natchez Trace Parkway) has not asked for it to be included. Also the Parkway has not told the Planning Commission what this land will be used for and has not assured the Planning Commission that the land shall be used permanently as open space as required by the zoning code. The Planning Commission has not approved this acreage for open space as required and also the developer went to court and received a fair compensation for this land using the fact that he would lose lots after the property was taken by the Parkway. Mr. Ragsdale responded by saying this was not evaluated on lot basis and that the Planning Commission was aware of the use of that land for the future and this falls under the regulations and uses of the 1973 zoning ordinance. The developer feels that this is legal to be under the open space and should not be taken out of the original 676 acres and they would like for the Board to rule on this.

Mrs. Moyer stated that she cannot see why this was brought before the Board since the Planning Commission has not approved the Natchez Trace Parkway and the owners of the parkway have not requested anything. There was no action taken by the Board on this matter.

There being no further business to come before the Board the meeting was adjourned.

Respectfully submitted,

Gayle Moyer, Secretary

APPROVED:

DATE: April 7, 1981

THE PLAN WILLIAMSON COUNTY TENNESSEE

Vol. 5

1973

CHAPTER V

RESIDENTIAL AND URBAN DEVELOPMENT POLICY STATEMENT

Williamson County should allow for future residential development, such development being types as varied as the various life styles of the residents would require. This residential development should integrate, in an orderly manner, urban and suburban growth into the rural character of the County, retaining insofar as possible the basic identity of Williamson County. Urbanization should be controlled and population growth balanced with commercial and industrial development to provide a sound tax base for the County. Illustration 25 indicates the 1990 Land use and Major Thoroughfare Plan for Williamson County.

Land Suitability. Generally, residential development should be limited in areas of steep slopes, and prohibited in flood plains and other areas where the land is unsuitable for development. Preserving open space and the natural character of the land should be the guiding principles in all forms of residential development.

Density. There should be various levels of density of residential development in Williamson County. Generally, higher density development should be in the northern part of the County, where there is natural "spill-over" from Nashville, and near present concentrations of population in the County. High density development should be

located in those areas where County services, such as water and sewers, are available or can be economically made available.

Subdivisions. Further subdividing of land in Williamson County should be permitted, with such subdivisions being designed to be aesthetically pleasing and compatible with surrounding areas. Lot shapes and sizes should be varied and designed to leave the land and trees in their natural states.

Multi-family housing. Realizing that multi-family housing units provide a life style desired by many people, Williamson County zoning laws should permit such developments. However, apartments and mobile homes should be discouraged. Condominiums, because of their permanency, are preferable to apartments. Within multi-family developments there should be minimum open space requirements.

Cluster housing. The cluster concept of residential development should be encouraged since it provides a life style desired by many people. At the same time cluster developments provide opportunities for imaginative planning, make providing county services more economical, and allow for the preservation of historic and scenic sites and recreational facilities. There should, of course, be minimum open space requirements in such developments.

Planned Unit Development. The planned units development is a step beyond the cluster concept. It too is a desirable form of development from the economical and ecological standpoints. It is economical in respect to pro-

viding County services, and the concept is predicated on the idea of preserving open space. Further, the planned unit development is desirable because it integrates community facilities into the development with the convenience of the residents as the basic concept. All such projects should be approved by the County Court.

Minimum Lot Sizes. In residential zones in the County where there are no development restraints because of land capability, the minimum lot size should be three-fourths acre in areas served by sewers and . . .

PAGE 13 MISSING

CHAPTER VI

PUBLIC FACILITIES

POLICY STATEMENT

Recognizing that Williamson County is obligated to provide public facilities for its residents, the Planning Commission feels that such facilities should be designed to best serve the needs of the residents at the least cost to the County.

Water and Sewers. Utility districts should be formed throughout the County with logical geographic boundaries, taking into consideration sources of water and gravitational flow systems for sewers. Sites for sewerage systems should be located at points where such systems can tie in with regional sewer systems, one such possible location being Nolensville where sewers could follow Mill Creek and intersects with Metro's sewer system. Further, all sources of funding, including private capital and Federal funds, should be investigated in the establishment of

such utility districts. The ultimate goal is that as many residents of the County as possible have access to a public supply of water and that where there is a public supply of water there should also be a *public sewer system*. Further, developers should be encouraged to install self contained sewerage treatment facilities in developments where such systems are feasible.

Schools. Specific sites for schools should be located in areas of rapid population growth, such sites being large enough to accommodate future school population growth. Such sites should be selected in conjunction with current educational policies and philosophies of the Williamson County Board of Education and the Tennessee State Board of Education. Generally, elementary and junior high schools should be . . .

PAGE 15 MISSING

Fire Protection. Fire protection service should be available to all Williamson Countians. The County should negotiate with municipalities having fire departments and private fire departments for those departments to serve residents in outlying areas.

Telephones. Williamson County should be served by adequate telephone service. There should be toll free service between all exchanges in Williamson County and also toll free service in Nashville.

Airport. Population growth and industrial expansion will increase the demand for air service in Williamson County. An airport should be located near concentrations of industrial sites, at the same time being as far as possible from population concentrations.

Park. There should be a major recreational area in Williamson County in the form of a public park. Such a park should be located in Williamson County near such spots as large water impoundments, the Franklin Battlefield or the Natchez Trace.

Places of Assembly. There should be provided for residents of Williamson County community centers where people might gather for the purpose of holding meetings of various clubs and civic groups in the County. At the present time in Williamson County there are several community centers which are, for the most part, abandoned schools. Such centers are used as places of assembly for groups within the communities. Many such centers technically still come under the jurisdiction of the Williamson County Board of Education. Where possible, titles to these centers should be officially vested in the County, and the County should contribute to the upkeep and maintenance of these centers. A study should be conducted to investigate the possibility of acquiring additional land adjacent to such centers for public parks and recreational areas.

PAGE 17 MISSING

Stone Fences. The many stone fences in Williamson County should be protected from decay and destruction.

Phosphate Mining. Miners of phosphate should be required to reclaim and recontour the land to its former state insofar as possible. Phosphate mining should be prohibited within 300 feet of all streams in the County.

Quarrying. Recognizing that limestone is one of Williamson County's chief natural resources and that there

is an increasing demand for limestone products, quarrying should be permitted in the County, but quarries should be closely regulated to reduce noxious discharges, and they should be located away from population concentrations.

Driveways on Highways. In order to promote safety on highways and connector roads, minimum lot widths on arterial highways should be 200 feet.

Electrical Wiring. To improve the scenic quality of subdivisions, all electrical wiring and telephone lines should be laid underground.

Mobile Homes. Recognizing that mobile homes provide a life style desired by many people, such facilities should be allowed in Williamson County. However, mobile homes should be closely regulated and prohibited in all areas other than the agricultural zone and specially zoned mobile home parks.

Mr. Lytle Brown, Engineer for the owners and developer of Temple Hills County Club Estates, a Cluster Development, presented for approval of the Commission a revised initial sketch of said development. Mr. Brown stated that he had met on several occasions with representatives of objecting residents of the area and several significant changes had been made in the plat as originally presented. These changes were explained by him and by Mr. Robert Martin and Mr. Martin expressed approval of the sketch. Mr. Brown stated that some reduction in the number of lots had been made but conceded that there was still a violation of the density provisions of the regulations as construed by the Secretary but no violation as said regulations had been construed by Mr. Robert Moran, and no

violation as construed by a formula which had been submitted by Mr. Vance Little.

Mr. Callicott commended Mr. Lytle Brown for the significant improvement in the plat. Mr. Robert Moran also expressed pleasure that the plat had been vastly improved and noted that the people in the immediate vicinity of the development were apparently reasonably well satisfied with what had been worked out. Mr. Robert Moran then moved to approve said revised initial sketch. The motion was seconded by Mr. John Moran and was passed by unanimous vote except for two abstentions, those abstainers being Mr. Westbrook and Mr. Callicott.

Comment: The development, located in the Tenth Civil District and containing 31 lots in 45.91 acres, has the necessary water lines installed and preliminary grading has been initiated. Preliminary and final approval was granted subject to submission of a bond for completion of required improvements.

Item 6: A portion of the bond on Montpier Subdivision, Sections I, II, and III in the amount of \$10,000 was asked to be released.

Comment: Following discussion, the bond in the amount so indicated was released.

Item 7: A local farmer, Hal Hurd, appeared before the Commission asking that he be allowed to cure hams on his property for resale.

Comment: It was pointed out that the proposed business is in an agricultural zone and that he would raise his own animals, transport them for slaughter, and cure portions of the animals on his property for wholesale distribution

to hotels and the like. The Commission members ascertained that the land use is permissible in the zone.

Item 8: Rezoning request on Nolensville from Agricultural to Commercial was submitted to the Commission.

Comment: Staff presented a land use map depicting the agricultural nature of the area and noted that such a rezoning would constitute spot zoning, that the proposed 1990 land use map recommends a business cluster in Nolensville, and that such a business use would constitute a traffic hazard on the two lane highway which has a speed limit of 65 mph. The Commission voted to recommend the zoning change, however, the Commission will wait until the June meeting and recommend rezoning of a larger area along the highway which will encourage strip development in the area.

Item 9: Harpeth River Estates, Section II, was submitted to the Commission for final approval.

Comment: The development, located in the Sixth Civil District and containing 7 lots in 10.57 acres was granted final approval subject to the submission of a bond for required improvements.

Item 10: A policy on submitting bonds in lieu of required improvements was discussed.

Comment: It was decided that Mr. Joe Bowman, County Building Inspector, should be contacted well in advance of the meeting at which final approval is to be considered in order that he may work with the developer and others on setting the amount of the bond which should then be submitted to the Secretary either before the meeting or at the time action on the development is taken.

Item 11: A revised preliminary plat of Temple Hills, Country Club Estates, a cluster development, was presented for preliminary approval.

Comment: The revised plat indicated no lots fronting Sneed or Temple Roads, less lots than the previous plat, reserved land for future development for condominiums and other uses, and definite density provisions. Citizens in opposition to the original plan said that they had seen revised plans but not the particular plan being reviewed. Since no opposition was voiced against the plat, preliminary approval was granted.

Item 12: Royal Oaks Subdivision was presented for consideration of revision of preliminary approval.

Comment: The plat indicates that lots on proposed cul-de-sacs would have double frontage as Liberty Pike would adjoin the lots to the rear. It was recommended that deed restrictions be incorporated to prevent driveway access onto Liberty Pike. The plat was granted preliminary approval.

Item 13: Montpier Farms, Section V, was submitted for renewal of preliminary approval and final approval.

Comments: Staff noted that only some preliminary grading had been started on roadway, however, it appeared that all water lines had been installed. The development, located in the Sixth Civil District and containing 55 lots in 121.5 acres, was granted a renewal of preliminary approval and final approval subject to all required signatures on the final plat and the submission of a performance bond for necessary improvements.

Item 14: A proposed motel development in an Interchange Business Zone located on Highway 96 and Interstate 65 across the highway from the Holiday Inn, was

presented to the Commission for approval as stipulated in the Zoning Ordinance.

Comment: The proposed development, meeting all requirements of the Zoning Ordinance, was granted approval.

Item 15: Redwing Subdivision, Section III, was presented for preliminary approval.

Comment: A drainage plan was presented as requested to assist the Commission in understanding how surface runoff would be removed from the area. The development, located in the Tenth Civil District and containing 35 lots in 33.5 acres was granted preliminary approval subject to adequate provisions for drainage.

Item 16: Illegal subdivision development within the County was discussed.

Comment: Staff and county attorney are to look into the matter on what can be done and report at a future meeting.

Item 17: Oakwood Estates Subdivision was presented for renewal of preliminary approval.

Comment: Renewal of preliminary approval was granted. There being no further business, the meeting adjourned at 10:35 p.m.

November 26, 1976

Mr. James Patterson
Temple Road
Nashville, Tennessee 37221

Re: Number of units allowed in
Temple Hills Country Club Estates

Dear Mr. Patterson:

The preliminary plat of Temple Hills Country Club Estates on file in our office indicates that 736 housing units have been approved by the Planning Commission.

Our files also indicate that no action has been taken on this over-all preliminary plat since the summer of 1975.

I hope the information provided above is sufficient. If I can be of further service, please call on me.

Respectfully yours,

Tom Ragsdale
Williamson County Planner

TR:cf

March 22, 1978

Mr. Leon Stanford
Stanford and Associates
1650 Columbia Pike
Franklin, TN 37664

Dear Leon:

RE: Temple Hills

Our files indicate the below listed dates relating to Planning Commission action on Temple Hills.

2- 1-73	Initial sketch plat approved
5- 3-73	Revised initial sketch plat approved
6- 7-73	Final approval, section I
1-17-74	Final approval, section II
6- 6-74	Revised preliminary plat, Revised final plat, section I
8-15-74	Final approval, section III
2- 6-75	Revised final, section II, phase I
6-19-75	Revised preliminary approval
8-18-77	Revised final plat, section I

Sincerely yours,

Tom Ragsdale
Williamson County Planner

JTR/veb

July 19, 1979	? Renewal PP
Aug. 16, 1979	Renewal PP

June 16, 1978

Joe Hart & Company

Dear Sir:

As approved on preliminary, Temple Hills Country Club Estates consists of 676 acres with a total of 736 dwelling units to be built in the future. As shown on the plat, the areas marked "This parcel not to be developed until approval by the Planning Commission" is included in the total 736 units.

Cordially yours,
Tom Ragsdale
Williamson County Planner

JTR/veb

TO: Mid-Cumberland Council of Government and
Development District

FROM: Morton Stein, Williamson County Planner

DATE: June 7, 1979

SUBJECT: A-95 Review of Temple Hills Preapplication
Analysis and Mortgage Insurance 70-574

The Temple Hills Country Club Estates Subdivision is an approved subdivision. Their preliminary plat will be considered for renewal in July. The property under consideration is zoned for Open Space Residential Development and the intended use and the development are in conformance with this zone. This development is in conformance with the Williamson County Plan adopted in 1973.

The Williamson County Planning Commission has discussed and reviewed this subdivision on several occasions and wanted the following comments concerning the prog-

ress of development and the concern of the residents of the subdivision conveyed to HUD for their review.

(A) There have been problems concerning the installation of improvements in the past and there have been several complaints from residents concerning the condition of the roads.

(B) There has been concern expressed by residents of the subdivision concerning changes in the covenants and in the "open space" areas.

(C) It should be noted that the "open space" area is a Country Club/Golf Course that is a privately owned club.

September 29, 1980

505 Fair Street
Franklin, Tennessee 37064
Mr. J. T. Ragsdale, M. S. P.
Box 189
Bellevue, Tennessee 37221

In re: Temple Hills County Club Estates

Dear Tom:

I was a principal planner with the Tennessee State Planning Office, Local Planning Division, Middle Tennessee Section, from February, 1973 through August, 1974. Williamson County was one of my contract areas for this entire time period.

One of my responsibilities was to make recommendations on agenda items presented to the Williamson County Regional Planning Commission. Temple Hills Country Club Estates was presented as one of those items, which actually began before I commenced working with the Commission. I worked on the sketch plan with the engineer on the project, Mr. Lytle Brown. Mr. Brown and I eventually agreed that 736 dwelling units would be permitted on 676

acres. I also recommended that Mr. Brown place the dwelling unit figure on the sketch plan. As final plats were presented to the Commission and approved, the approved lots would be subtracted from the total dwelling unit figure. This would eliminate any disagreement in the future as to the number of dwelling units remaining to be approved. To the best of my knowledge, Mr. Brown told the Commission that it would be anticipated that the project would contain an undetermined number of multiple family dwelling units, which, of course, would not exceed the remaining permitted total dwelling units. He said that he would rather have the Commission consider the specific multiple family dwelling unit sites as the planning for the project progressed. The Commission approved the sketch plan on May 3, 1973.

When I may be of further assistance, please call on me.

Sincerely,

/s/ Bob Martin
City Planner

RM/rm

Williamson County Regional Planning Comm.
Williamson County Courthouse
Franklin Tn 37064

Dear Mr. Chairman:

We the undersigned members of the 1973 Williamson County Planning Commission, desire to set the records straight concerning the approval of Temple Hills Country Club Estates. On May 3, 1973, Temple Hills Country Club Estates was approved by the Commission. The development consisted of 676 acres and was approved for 736 dwelling units. At the time of approval this development met all county requirements.

/s/ (Signatures Illegible)

ARTICLE I TITLE AND PURPOSE

This Zoning Resolution is passed pursuant to enabling legislation contained in Tennessee Code Annotated, Sections 13-401 through 13-416. Its purpose and welfare of the present and future inhabitants and property owners of Williamson County. Specific objectives include lessening congestion on the County's roads and reducing wastes of excessive amount of roads; securing safety from fire and other dangers; promoting the availability of adequate light and air; preventing, on the one hand, excessive concentrations of population and, on the other hand, excessive and wasteful scattering of population, preserving, protecting and enhancing scenic and aesthetic values, promoting a distribution of population and classification of land uses and distribution of land development and utilization that will tend to facilitate and conserve adequate provisions for transportation, water flow and supply, drainage, sanitation, educational opportunity, recreation, soil fertility, food supply and the protection of both urban and non-urban development.

The zones as hereinafter named and designated are hereby created and Williamson County is hereby divided into zones as shown on the zoning map attached hereto, which map with explanatory matter thereon is adopted and made a part of this resolution and is filed with the County Register.

This Resolution shall be known as the ZONING RESOLUTION OF WILLIAMSON COUNTY, TENNESSEE.

ARTICLE II NON-CONFORMING USES

1. *Purpose*—With the adoption of this Zoning Resolution and Zoning Map there will be non-conforming

uses within the various zones in Williamson County. It is the intent of this Section to permit the continuance of such non-conforming uses, at the same time limiting their enlargement and prohibiting their re-establishment after their discontinuance.

2. *Provision for the Continuing*—The adoption of this Zoning Resolution and the Zoning Map by the Williamson County Quarterly Court shall in no way be deemed to prohibit the continuance and non-conforming use of a structure or land within any Zone: provided, however, such continuance shall be subject to the following limitations.
3. *Limitation on Expansion*—Any structure being used for a non-conforming use may not be enlarged by more than twenty-five percent (25%) of its floor space or area within which the non-conforming use is carried on at the enactment of this Zoning Resolution. This provision shall not be construed as prohibiting ordinary repairs and maintenance.
4. *Prohibition Against Re-Establishment*—If a structure or land area should cease to be used for a non-conforming use for a period of three (3) years, such non-conforming use shall not be re-established after the expiration of that three (3) years.
5. *Partial Destruction*—If a structure being used for a non-conforming use should be destroyed, or partially destroyed to the extent of seventy-five (75) percent or more of its fair market value and if such structure is not rebuilt within an eighteen (18) month period, said structure shall not be rebuilt, and the non-conforming use shall not under any condition be continued after such destruction or partial destruction.

6. *Non-Conforming Use of Land*—No non-conforming use of land may be enlarged to any extent so as to occupy any more land than occupied at the adoption of this Zoning Resolution, and no such non-conforming use of land shall be moved in whole or part to any other land area.

ARTICLE III

HOME OCCUPATIONS

1. *Purpose*—It is the purpose of this Section to permit within any zone where dwellings are permitted as an additional use the use of a dwelling for a business, such business being one which ordinarily might be carried on in a home, at the same time the dwelling retaining the primary character of a home.

Application—This provision shall apply to all zones in which residential uses are permitted as designated and defined by this Zoning Resolution. Provided, however, every open space residential development shall be approved by the Williamson County Quarterly Court.

ARTICLE XII

AUTOMOBILE STORAGE

1. *Purpose*—The purpose of this section of the Zoning Resolution of Williamson County is to insure that every lot in Williamson County provides adequate parking for the use being carried on the lot.
2. *Minimum Standards*—Automobile storage facilities shall be provided on all lots in Williamson County.

The parking area shall be in accordance with the following minimum standards:

- a. *Amusement Places*—One (1) parking space for each employee, plus one (1) parking space for each three (3) patron seats.
 - b. *Apartments*—Two (2) parking spaces for each dwelling unit.
 - c. *Churches*—One (1) parking space for every five (5) seats.
 - d. *Dining Places*—One (1) parking space for each employee, plus one (1) parking space for each two (2) patron seats.
 - e. *Dwelling*—Two (2) parking spaces for each dwelling unit.
 - f. *Funeral Home*—One (1) parking space for each five (5) seats, or, in case of no fixed seats, one (1) parking space for every fifty (50) square feet of chapel space.
 - g. *Hospitals*—One parking space for each four (4) beds, plus one (1) parking space for each doctor and one (1) parking space for each nurse and other employee.
 - h. *Hotels and Motels*—One (1) parking space for each room, plus one (1) parking space for every two (2) employees.
3. *Appeals*—An appeal to the Board may be taken by an person aggrieved by a decision of the Building Commissioner based upon the provisions of this Resolution. The Board shall fix a reasonable time for the hearing on the appeal; give proper notice of a public hearing before the Board by publishing such notice in a newspaper or general circulation in Williamson County, Tennessee, at least ten (10) days prior to the date set for the public hearing. At the hearing, any person or party may appear and be heard in person, by agent, or by attorney.

4. *Powers*—The Board shall have the following powers and duties:

- a. To hear and decide appeals on any permit, decision, determination, or refusal made by the Building Commissioner or other administrative official in the carrying out or enforcement of any provision of this Resolution; *and to interpret the Zoning map and this Resolution.*
- b. To hear and decide applications for special uses upon which the Board is specifically authorized to pass by the terms of this Resolution.
- c. To hear and decide applications for variances from the terms of this Resolution. Such variances shall be granted only where by reason of exceptional narrowness, shallowness, or shape of a specific piece of property which at the time of adoption of this Resolution was a lot of record, or where by reason of exceptional topographic situations or conditions of a piece of property the strict application of the provisions of this Resolution would result in practical difficulties to or undue hardship upon the owner of such property. In granting a variance, the Board may attach thereto such conditions regarding the location, character, and other features of the proposed building, structure, or use as it may deem advisable in furtherance of the purpose of this Resolution. Before any variance is granted it shall be shown that special circumstances attached to the property do not generally apply to other properties in the neighborhood.
- d. The Board of Appeals shall also have the power to interpret the zoning maps and pass upon disputed questions of lot lines or district boundary lines or similar questions as they arise in the administration of the zoning regulations.

5. *Home Occupation*—An incidental occupation customarily carried on in the residence, utilizing no more than twenty-five (25) percent of the usable floor area of all buildings; provided, (1) no article or service be sold or offered for sale on the premise other than that produced by such occupation, and (2) such occupation shall not require the alteration of buildings, new construction, or equipment and machinery not customarily used in residential areas.
6. *Landscaping*—The use of both natural and artificial materials to enhance the physical appearance of a site, to improve its environmental setting, or to screen all or part of one land use from another.
7. *Lot*—A piece, parcel, or plot of land in one (1) ownership, which may include one (1) or more lots of record, occupied or to be occupied by one or more principal structures and accessory structures and including the open spaces required under this ordinance.
 - a. *Lot Lines*—The boundaries dividing a given lot from the street, an alley, or adjacent lots.
 - b. *Lot of Record*—A lot whose existence, location, boundaries, and dimensions have been legally recorded in a deed or plat and filed as a legal record.
8. *Nonconforming Use*—The use of a structure or of land that does not conform with the provisions of this ordinance for the district in which it is located.
9. *Shopping Center*—A group of compatible commercial establishments planned, developed, and managed as a

- unit, with an automobile storage area provided on the property; the center must also be related in location, size, and type of shops to its trade area.
10. *Sign*—Any structure or part thereof or device attached thereto, painted on, or in any other manner represented on a building or other structure, which is used to announce, direct attention to, or advertise, and is visible from outside a building which displays any writing (including illustration or decoration); emblem (including device, symbol, or trademark); flag (including banner or pennant); or any other figure of similar character. Any of the above characteristics constitutes a sign within a building only when illuminated and located in a window.

Key to interpret the old zoning item numbers to the new zoning item numbers.

ZONING DISTRICT IDENTIFICATION

Item No.	Zone	Minute Book	Page
1	C	—	—
2	C	6	456-459
3,4,5,6	C	7	91-92
7	C	7	308
8	C	7	320
9,10	I	7	302-303
11,12	C	8	10
13	I	8	10
14	PA	8	11
15,16	C	8	11
17,18	C	8	284-285
19,20,21	C	8	380-382
22	I	8	380-382
23	C	8	439-440
25	R	8	440
26	C	8	470
27	I	8	470
28	I	8	0505-0506
29, 30	C	8	0563-0564
31	C	8	0606-0607
32, 33	C	9	58-59
34, 35	R	9	59-60(?)
36, 37, 38	C	9	69-70
39	R	9	83
40	C	9	85-86
41, 42	PA	9	96-97
43	C	9	112
44	C	9	121
45	C	9	119-120
46	I	9	119-120
47	C	9	119-120
48	C	9	128
49, 50	C	9	130
51	C	9	141
52, 53	R	9	159-160
54	R	9	182-183
55	C	9	242
56	C	10	17 & 18
57	OSRD	210-219	64 & 274
58	OSRD	222	584
59	OSRD	244	749
60	OSRD	217	154 & 161

OLD/NEW

OLD/NEW

1/ 1	67/43
2/ 2	69/44
5/ 3	70/45
6/ 4	71/46
7/ 5	72/47
8/ 6	74/48
15/ 7	75/49
16/ 8	76/50
17/ 9	77/51
18/10	78A/52
22/11	79/53
23/12*	80/54
24/13*	83/55
25/14*	84/56
26/15*	- /57
27/16*	- /58
31/17	- /59
32/18	- /60
37/19	93/61
38/20	94/62
39/21	95/63
40/22	96/64
41/23	85/65
44/24	86/66
45/25	87/67
46/26	88/68
47/27	- /69
28/28	- /70
49/29	- /71
51/30	89/72
53/31	90/73
55/32	91/74
56/33	92/75
58/34	97/76
59/35	98/77
60/36	99/78
61/37	100/79
62/38	101/80
63/39	
64/40	
65/41	
66/42	

* Old and new items have been consolidated under new item 74.

AMBROSE PRINTING CO.

DON WADE

Tom Ragsdale:

Issues;

1. which regulations '73 or '77
2. Slope analysis how computed
2. 18.5 acre taken

County Plan Conformance

AMBROSE PRINTING CO.

DON WADE

- Open Space approved or laid out and designed in 1977.
Temple Hills is non conforming
- Non Conforming
- Length or width of lot/rise of the lot.

APPLICATION TO
BOARD OF ZONING APPEALS

Appellant Patterson & Associates Address Temple Road

Owner Jim Patterson Address

Location of Property Sneed Road & Temple Road

(Street or road, Subdivision, lot number)

Size of Property 676 acres

Present Zoning Residential Cluster Civil District

Describe in detail what action you request from the board of Zoning Appeals.

If a variance is sought, provide information relating to the peculiar or unusual conditions which justify a variance. If a special exception is sought, please give all details. If an interpretation is requested, provide all necessary facts. If additional space is necessary, please use back side of this form.

Request an interpretation of the Residential Cluster zoning as it relates to Temple Hills Country Club Estate

Are adjacent landowners aware of your request?

(Letters from adjacent landowners should be presented to the Board of Zoning Appeals at its meeting.)

/s/ Tom Ragsdale

DATE: Oct. 3, 1980

Date of hearing before Board:

Building Permit No. _____ Date _____

Decision by the Board: _____

TOWER REAL ESTATE DEVELOPMENT CO.
RESIDENTIAL . COMMERCIAL . INDUSTRIAL

TELEPHONE
790-3700

114 THIRD AVENUE, SOUTH
FRANKLIN, TENNESSEE 37064

October 24, 1980

Mr. Mort Stein, County Planner
Williamson County Courthouse
Franklin, Tn 37064

Dear Mort:

Please place Tower Real Estate Development Company on the next Board of Zoning Appeals agenda for a request of a variance on all vacant lots in Oakwood Estates that are affected by the Residential A zone change requiring a one hundred-foot front setback. All building permits that have been issued previously have shown the

house on a fifty-foot setback, which is in compliance with the recorded plats.

In order to keep the houses consistent and to keep people in the future from having to look out their front doors into their neighbor's back door, we feel that a variance to a 50-foot setback, if it is necessary as you say, would be justified.

Please advise me as to the time and date of the meeting. Your cooperation is appreciated.

Sincerely,

/s/ Gerald
Gerald G. Bucy
Project Manager

GGB:hb

RECEIVED OCT. 24, 197(?) WMSON. CO. PLAN. COM.

M I N U T E S
BOARD OF ZONING APPEALS
OCTOBER 7, 1980

The Williamson County Board of Zoning Appeals met in regular session on October 7, 1980 at 7:30 p.m. in the Williamson County Courthouse. The following members were present: Gayle Moyer, Joey Davis, E. A. Jagers and Pete Davis. Also present was staff representative Morton Stein.

The first item on the agenda was a request from Mrs. Maggie Kennedy, represented by Mary Rollins. Mrs. Rollins indicated that the 55 ft. x 10 ft. trailer would be placed on a lot which is basically a 1/2 acre lot. The plat of this property showed the dimensions of the lot to be 213 ft. road frontage x 132 ft. x 133 ft. x 172 ft. The Board was informed that the present house is only 24 ft. x 12 ft.

There was a lengthy discussion concerning a non-conforming use. Motion was then made by Gayle Moyer that based on the facts known by the Board and if the trailer is attached to the house, that no action is necessary by the Board as long as all setbacks can be met. Joey Davis seconded the motion; motion carried unanimously.

Mac Kelton, representing James Council, requested a variance of the front setback line on a lot of record on Sunny Side Court, Sunny Side Subdivision, lot #54. This house had been built over five years ago and has had several different owners. The Board was told that the front setback is 100 feet and only a small portion is outside the required setback. There was some discussion by the Board members concerning how the measurements had not been properly taken by the original surveyor. Motion was made by Gayle Moyer to grant a 49 ft. front setback variance. Ed Jagers, seconded the motion; motion carried unanimously.

Mr. Stein raised the question as to whether the Board of Appeals had made an interpretation regarding trailers on permanent foundations. It was indicated that no specific interpretation had been made by the Board. Mr. Stein advised that this would be forthcoming at the next meeting.

With no further business to come before the Board the meeting was adjourned.

Respectfully Submitted,

Gayle Moyer, Secretary

DATE:

APPROVED:

WILLIAMSON COUNTY PLANNING
COMMISSION

Public Square
Franklin, Tennessee 37064

October 9, 1980

Bernard Krowalsh
673 Sneed Road
Franklin, TN 37064

Dear Mr. Krowalsh:

In reference to your inquiry pertaining to a variance for the setback on Sneed Road, you need to apply for a variance to the Williamson County Board of Zoning Appeals. I am enclosing an application for you to fill out. You must send this application back to my office by October 24, 1980, to be heard at the next Board of Appeals meeting which will be held at 7:30 p.m. November 4, 1980 in the Circuit Courtroom of the Williamson County Courthouse.

Sincerely,

/s/ Morton Stein,
Williamson County Planner

MHS/vjc

Enclosure

1283 Murfreesboro Road, Nashville, Tennessee 37217
615/361-3400

MAREMONT CORPORATION

Reply to:
P.O. Box 1488
Nashville, Tenn. 37202

December 23, 1980

Williamson County Planning Commission
Public Square
Franklin, Tennessee 37064

Attn: Mr. Morton Stein

Dear Mr. Stein:

The latter part of October, I provided the Commission with an application for variance to be made regarding the setback of my home. Since then, I have not heard anything and I am wondering what the result of my application was.

I did not attend the meeting on November 4, as your letter did not indicate that I needed to be there during the meeting. Would you please bring me up-to-date concerning my request.

Sincerely,

/s/ B. Krawulski
673 Sneed Road
Franklin, TN

BK/jp

Never got the variance. We will place you on February 3rd, 1981, agenda.

According to the state code, it appears that the developer does not have a right to appeal for an interpretation of the Zoning Board of Appeals unless he is refused a building permit. We will present further evidence of this at the meeting on the eleventh.

If you have any questions please notify Mort at his office.

MHS/vjc

Enclosure

WILLIAMSON COUNTY PLANNING
COMMISSION

731 Columbia Ave.
Franklin, Tennessee 37064

TO: Board of Zoning Appeals
FROM: Morton Stein, County Planner and Mitchell
Crawford, County Attorney
SUBJECT: Item on November 11, 1980 agenda concern-
ing question of interpretation of the zoning
ordinance for the Temple Hills development.
DATE: November 6, 1980

Enclosed is a report prepared by the County staff concerning the question of zoning interpretation of the Temple Hills development. We have addressed all the questions raised by the developer and ask that you review this information before Tuesday night.

Another question has been raised by the staff that concerns the developers standing before the Board of Appeals. Tennessee Code Annotated (TCA) in its designation of the powers of the Board of Appeals (TCA 13-409) states:

- "1. To hear and decide appeals where it is alleged by the appellant that there is error in any order, requirement, decision or refusal made by the county building commissioner or any other administrative official in the carrying out or enforcement of any ordinance enacted pursuant to this chapter.
2. To hear and decide, in accordance with the provisions of any such ordinance, requests for special exceptions or for *interpretation of the map* or for decisions upon other special questions upon

which such board is authorized by any such ordinance to pass." (emphasis ours)

The Williamson County Zoning Resolution reads:

- "4 a. To hear and decide appeals on any permit, decision, determination, or refusal made by the Building Commissioner or other administrative official in the carrying out or enforcement of any provision of this Resolution; and to *interpret the Zoning map and this Resolution.*" (emphasis ours)

This is in conflict with the state law and it is the opinion of the county attorney that it is probably in violation of state law. He is writing a letter to the Attorney General asking for his opinion.

Temple Hills Subdivision
Zoning Question

Background:

The developer had a total of 676 acres originally. The 736 "allowable" units was derived by multiplying 676 by 43,560 and dividing by 40,000. According to the '73 zoning code, this would be the maximum number of units allowed assuming that there was no property with slopes over 25% and no property that was in the floodplain.

The Plat had the following notes:

"Allowable Dwelling Units for Total Development"	736
"Allowable Dwelling Units Exclusive of Reserved Parcels"	597
"Allowable Dwelling Units Future Development"	469

Parcels with note "This parcel not to be developed until approved by the Planning

Commission not a part of this plat and not included in gross area"

Covenants and open space easement to the county for approximately 245 acres were filed with the Williamson County Registers Office in 1973.

The Preliminary Plat was renewed in June, 1974 with revisions changing the name of roads and the location of tennis courts and swimming pool area and showing Section II Condominiums that had been approved for final for 38 units by the Planning Commission.

June 19, 1975 the Preliminary Plat was renewed with some changes in location of recreation locations.

October 1977, the restrictive covenants were revised changing the set backs, minimum house square frontage requirements on lots off the golf course, allowing driveways on Sneed Road and allowing zero side set backs in the condominium units. In April, 1978 the Preliminary Plats were renewed with revisions to move the entrance to the Club House from Canterbury Lane to Temple Road.

In August, 1979 the Planning Commission renewed the preliminary plat as a new plat with the provision that the plat meet 1979 regulations. This plat contained all the changes made on the final plat of Section I (additional lots on Sneed Road and differences in open space).

There have been some changes in the zoning requirements for open space residential development (formerly residential cluster developments). The principal differences in the original zoning requirements and those adopted in 1977 are:

(1) Density:

Original ordinance states: The density of a cluster development shall be no greater than the density allowed under the zoning classification as set forth in the zoning ordinance of Williamson County applicable to the area being developed according to the provisions of this amendment without regard to this amendment; provided, however, said density shall be computed on the basis of total acreage less fifty percent (50%) of the land lying in the floodplain as shown on an official flood study and less fifty percent (50%) of all land lying on a slope with a grade in excess of twenty-five percent (25%). Land allocated to open space shall not be less than the aggregate amount by which lots are reduced under the provisions of this amendment.

The present regulations on density state: The density of an open space residential development shall be no greater than the density allowed under the zoning classification as set forth in the Zoning Resolution applicable to the area being developed. In no event shall such density be more than one (1) dwelling unit per acre. In computing the permitted density in a development, the gross acres in the tract of land to be developed shall first be reduced by ten percent (10%) to allow for streets and utilities. The remaining land area shall be further reduced by fifty percent (50%) of the land lying in the flood plain and still further reduced by fifty percent (50%) of the land lying on a slope with a grade in excess of twenty-five percent (25%).

- (2) The original regulations state that the plat approval process should be "prepared and reviewed by the Planning Commission under the plat approval procedure of the Subdivision Regulations." The present regulations state that: "A preliminary site plan and supporting data shall be submitted to the Williamson County Regional Planning Commission," and makes no reference to being reviewed under the subdivision regulations.
- (3) The original regulations do not require County Commission review or approval of plans but only states that "This amendment shall apply to all zones in which residential uses are permitted as designated and defined by the Williamson County Zoning Resolutions and Williamson County Quarterly Court." The present regulations states that "... every open space residential development shall be approved by the Williamson County Quarterly Court."
- (4) The original zoning does not allow for commercial facilities while the present regulations allow for "Commercial facilities, the primary purpose of which is to serve the residents of the open space residential development."

Also, even though the present zoning requirements do not refer to the subdivision requirements, the approval and recording procedures of the Williamson County Subdivision Regulations would apply since this would be a

subdivision as defined by state law. Since the developers are proposing a plan for the areas that were not designated by lot lines on the original plat, it is staff's opinion that this new plan would have to be reviewed and approved by the County Commission after review by the Planning Commission. Both regulations require the plan to have "Arrangements of streets, structures and lots." The areas not shown on this plat by lot lines were not approved by either the Planning Commission or by the County Commission when they zoned this area Open Space Residential Development in 1977 by adoption of the Official Zoning Map of Williamson County.

In 1973 as in 1977 (when the zoning law changed) the developer had only 469 single family lots shown on his plat. There had been various changes such as adding lots on Sneed Road, adding 38 condominium lots and some changes to the open space and location of tennis courts and such. The Planning Commission to date has only approved 212 housing units (176 single family and 38 multifamily) for final approval which has been recorded by the developer.

Since 1977 the Developer has not submitted any new plats that significantly differ from the original plat submitted in 1977. This year, at the request of the Planning Commission, the developer submitted a plan showing the complete development of the property. This plan indicated that the developer was seeking 736 units for approval.

Question: Review the Temple Hills Density Requirements under Present Zoning Regulations or under Regulations approved in 1973 when development was first approved.

The question to be addressed by the Board of Zoning Appeals is if the density of this subdivision should be evaluated on the basis of the 1973 law it was originally approved under or under the present zoning restrictions. It is the County's position that this subdivision be evaluated under present zoning restrictions because:

- (1) This is the only zoning restriction on the books and when it was changed by the County Court in 1977, the change did not specifically exempt any previous property from the new code.
- (2) This is not a non-conforming use since only 212 units of the original 469 units approved on the sketch plan have been approved for final and only a little over 100 units have been built out. Until the full 212 units approved for final have been built out and the 569 units approved for final might the developer possibly have any "standing" for non-conforming use status.
- (3) The developer does not have "vested rights" for the following reasons:
 - (a) Only the minimum size water and sewer lines have been installed in this development.
 - (b) The installed water and sewer lines can be extended and used and not wasted if fewer units are approved.
 - (c) The installed streets can be used and extended with no loss of investment.
 - (d) The existing open space can be used for the smaller number of units. Since there is no minimum size of open space required, it was

the developer that determined the size and lay out of the golf course. There is only one reason the developer can't submit or change the size and lay out of the golf course to give himself more area for building housing units to the planning commission and County Commission and that is because he has sold the golf course to another entity. The developer has not given the golf course to the County, he has only given an easement guaranteeing that this property will be used for open space purposes. The golf course is a viable business venture and the present owner wants to continue it for this purpose and does not consider it a hardship that it must remain a golf course.

- (e) The developer had sufficient time since 1973 to finish this project before 1977 and the county did not do anything to restrict his development during that period of time. He claims financial problems with a recession and his lending bank going broke but he could have designed final plats and posted bonds during this period and submitted them for approval.
- (f) The Subdivision Regulations did state that a Preliminary Plat was approved for a one year period when this plat was approved in 1973. Even though the Plat was renewed after 1977, the notes on the plat stating "Parcels with note 'This parcel not to be developed until approved by the Planning Com-

mission' not a part of this plat and not included in gross area," indicated that the only lots that were being approved by the Planning Commission were the 469 lots plus the 38 condominium units.

- (4) Since the developer did not have approved finals and had not made improvements, or furnished bonds guaranteeing improvements and had not put to record lots of more than a small percentage of the total allowed in the 1973 zoning regulations at the time of the zoning change (1977), the development should be evaluated under the present zoning regulations.

Question: Should the developer be allowed credit for the 18.5 acres sold to the Natchez Trace Parkway?

The developer contends that the land (18.5 acres) he sold to the Natchez Trace Parkway by condemnation should be counted as open space and that this acreage should not be subtracted from his total calculated acreage because the zoning regulations do allow for "parkway areas" to be used for open space.

This cannot be allowed for open space because:

1. The owners of the property (The Natchez Trace Parkway) has not asked for it to be included. Also the Parkway has not told the Planning Commission what this land will be used for and has not assured the Planning Commission that the land shall be used permanently as open space as required by the zoning code.
2. The Planning Commission has not approved this acreage for open space as required by the zoning code.

3. The developer went to court and received a fair compensation for this land using the fact that he would lose lots after the property was taken by the Parkway.

Question: Are there any slopes in the development that are greater than twenty five (25%) percent?

The zoning code for Open Space Residential Development (OSRD) states that:

"5. *Density*— . . . The remaining area shall (be) reduced by fifty percent (50%) of the land lying on a slope with a grade in excess of twenty-five (25%) percent." The code also says that; "Buildable land includes all land except: (b) Land lying on steep hillsides with a grade in excess of twenty-five percent (25%)."

The developer claims that he has no land with slopes greater than twenty-five percent (25%). The Planner for the developer took the average slope from the top of the hill to the bottom. The county engineer, using standard engineering practice as outlined in *The Civil Engineers Reference Book* where slope is defined as the vertical rise divided by the horizontal distance, calculated that a minimum of 88 acres were in excess of twenty-five percent (25%). He determined the slopes using the contour intervals presented on the plat (two ft.) There were no calculations presented back when the original development was approved. Mr. Lyle Brown, the original designer of the development, said that they did not calculate slopes when the plat was presented and that they were planning to do it a later time. Also, when I told him that about 80 or 90 acres had slopes of greater than twenty-five (25%), he said that that sounded right.

PLAINTIFF'S EXHIBIT 9035

(SEAL)

WILLIAMSON COUNTY
Planning Commission
Public Square
Franklin, Tennessee 37064

June 23, 1981

Mr. Ralph Killabrew
Hamilton Bank of Johnson City
P.O. Box 1677
Johnson City, TN 37601

RE: Temple Hills Subdivision
Sketch Plan

Dear Mr. Killabrew:

At its regular meeting, June 18, 1981, the Williamson County Regional Planning Commission disapproved the Sketch Plans of the Temple Hills Subdivision submitted by you and your representatives for the following reasons:

1. The proposal does not comply with the density requirements of the zoning resolution of the County. We have calculated that there are 65.75 acres to be deducted for the 10% of Road and estimated that there are 88 acres with slopes greater than 25%. Therefore, the maximum number of units would be 548.
2. There are two (2) cul-de-sacs that are in excess of the subdivision regulations: Canterbury is about 5000 feet in length and Road "A,B,C" is over 3000 feet. (maximum length is 800 feet.)
3. There are road grades in excess of the Williamson County Road Regulations maximum grade requirements.

4. There are lots shown on land that is in excess of twenty-five (25) percent grades. This land should be in open space.
5. Temple Road is the main access road for the development and cannot handle the traffic generated by the proposed development because of the condition of the road.
6. The confusion of responsibility and progress for installing underground electric service in sections IV and V.
7. There are inadequate services to provide fire protection for the multi-family units proposed for this development. Also, there are no recreational facilities and open space provided for children and residents in the area for multi-family housing. (The only open space is limited to members of the Country Club).
8. The lots do not meet the minimum size one-half ($\frac{1}{2}$) acre and road frontage (125) of our subdivision regulations.

If there are any questions please notify my office. Staff will be glad to work with you and your representatives to correct the various deficiencies so as to comply with County zoning and Subdivision regulations.

Sincerely,

/s/ Morton Stein
County Planner

MS:dw

cc: Tom Ragsdale
Tom Nebel

PLAINTIFF'S EXHIBIT 9079

(SEAL)

WILLIAMSON COUNTY
Planning Commission
Public Square
Franklin, Tennessee 37064

TO: Mid-Cumberland Council of Government and
Development District

FROM: Morton Stein, Williamson County Planner

DATE: June 7, 1979

SUBJECT: A-95 Review of Temple Hills Preapplication
Analysis and Mortgage Insurance 70-574

The Temple Hills Country Club Estates Subdivision is an approved subdivision. Their preliminary plat will be considered for renewal in July. The property under consideration is zoned for Open Space Residential Development and the intended use and the development are in conformance with this zone. This development is in conformance with the Williamson County Plan adopted in 1973.

The Williamson County Planning Commission has discussed and reviewed this subdivision on several occasions and wanted the following comments concerning the progress of development and the concern of the residents of the subdivision conveyed to HUD for their review.

(A) There have been problems concerning the installation of improvements in the past and there have been several complaints from residents concerning the condition of the roads.

(B) There has been concern expressed by residents of the subdivision concerning changes in the covenants and in the "open space" areas.

(C) It should be noted that the "open space" area is a Country Club/Golf Course that is a privately owned club.

If there are any further questions, please contact my office.

 PLAINTIFF'S EXHIBIT 9111

September 30, 1980

Williamson County Regional Planning Comm.
Williamson County Courthouse
Franklin, Tn 37064

Dear Mr. Chairman:

We the undersigned members of the 1973 Williamson County Planning Commission, desire to set the records straight concerning the approval of Temple Hills Country Club Estates. On May 3, 1973, Temple Hills Country Club Estates was approved by the Commission. The development consisted of 676 acres and was approved for 736 dwelling units. At the time of approval this development met all county requirements.

/s/ (Signatures Illegible)

 PLAINTIFFS' EXHIBIT 9700

(map: included in appendix vol. III)

PLAINTIFFS' EXHIBIT 9701

(map: included in appendix vol. III)

PLAINTIFFS' EXHIBIT 9702

(map: included in appendix vol. III)

PLAINTIFFS' EXHIBIT 9707

(map: included in appendix vol. III)

PLAINTIFFS' EXHIBIT 9708

(map: included in appendix vol. III)

PLAINTIFF'S EXHIBIT 9850

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

NO. 81-3567-N

HAMILTON BANK OF JOHNSON CITY,

Plaintiff

vs.

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, et al

Defendants

TESTIMONY OF JOSEPH E. HUNT

(Filed April 1, 1982)

I. Summary of Qualifications

A. Academic

1. Tennessee Technological Institute, Cookeville, Tennessee
2. Various Real Estate Appraisal Courses:
 - a. American Institute of Real Estate Appraisers
 - (1) Appraisal I & II
 - (2) Industrial Appraisal
 - (3) Instructor's Workshop

b. Appraisal I

3. U.T.-Nashville

a. Condemnation Real Estate Appraisal

b. Appraisal I

c. Real Estate Law

4. International Association of Assessing Officers

a. Appraisal I & II

b. Computer Techniques and Real Estate Appraising

c. Industrial Real Estate

d. Personnel and Office Administration

B. Professional

1. M.A.I.: Member, Appraisal Institute, American Institute of Real Estate Appraisers
2. CAE: Certified Assessment Evaluator, International Association of Assessing Officers

C. Numerous awards and honors

D. Numerous articles and publications

E. Experience

1. 4 years to present Owner/Operator of Joseph E. Hunt & Company
2. 6 years as Senior Appraiser Division of Real Estate Assessments, Metro Government Nashville & Davidson County
3. 6 years in general real estate appraisal work
4. 4 years as Director of Real Estate Assessments in Alexandria, Virginia

II. Summary of Testimony

- A. Appraisal of Temple Hills Country Club Estate (the "Property") made as of February 17, 1982 and updates prior appraisal and valuation dated December 31, 1980.
- B. The appraisal deals with 257.65 acres of raw and undeveloped land which contains 476 potential building sites [2 units/acre]. The appraisal is based upon the original development plan for the property as approved periodically by the Williamson County Planning Commission ("the Development Plan").
- C. The appraisal considers the highest and best use of the Property which is zoned for residential cluster housing permitting single and two-family multifamily housing units with up to five (5) living units per acre; provided, however, that for each acre of building sites there must be at least one acre of open space somewhere in the development.
- D. The raw land appraisal completed as of December 31, 1980 indicated a value of \$1,850,000, based upon the developmental approach to valuation. This approach considers the total gross sales that can be obtained through land development and deducting all costs required to create development and applying present values to obtain a net value in the property. The appraisal considers comparable values and costs and expected time for sell-out of the project.
- E. The indicated value of the Property at February 17, 1982, based upon the developmental approach outlined above is \$1,035,000, which represents a downward adjustment of \$815,000. The downward adjustment is due to the following reasons:
 1. Potential development sites adjusted downward from 515 to 476;

2. Interest rate on investment capital adjusted upward from 12% to 15%;
 3. Revised method for calculating real estate tax liability.
- F. The Property at February 17, 1982 is in essentially the same status it was in at December 31, 1980. However, the Williamson County Planning Commission has now refused final approval of the development plan citing the factors enumerated in the letter of June 23, 1981.
 - F. (sic) A revised development plan, which takes into account the factors cited by the Williamson County Planning Commission in denying approval of the development plan, has been prepared by Mr. J.T. Ragsdale, Development Coordinator for the Temple Hills Project. This revised development plan eliminates 409 potential building sites from the development plan, leaving only 67 building sites. A revised appraisal of the Property, considering only 67 building sites, and using the development approach described above indicates a loss of in excess of \$1,000,000 for the completion of the development in accordance with the restrictive requirements of the 1981 letter of the Williamson County Planning Commission.
 - H. Therefore, it is my opinion that the Property under these regulations has no significant market value other than that which someone would pay for open space. The application of the regulations by the Williamson County Planning Commission has thus damaged the owner of the Property by \$1,035,000, the value of the Property assuming approval of the development plan as submitted.

Submitted by,

BASS, BERRY & SIMS

BY: /s/ John H. Bailey, III

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Testimony of Lewis Garber has been hand delivered to Robert L. Estes, Thomas M. Donnell, Jr., and M. Milton Sweeney, Attorney for Defendants, 14th Floor, Third National Bank Building, Nashville, Tennessee, this 1st day of April, 1982.

/s/ John H. Bailey, III

PLAINTIFF'S EXHIBIT 9851 SUCCESSOR TRUSTEE'S DEED

Address New Owner(s) As Follows — Hamilton Bank of Johnson City, P.O. Box 1677, Johnson City, TN 37601

Send Tax Bills To — Same

Map-Parcel Numbers —

WHEREAS, by Deed of Trust dated July 15, 1977, of record in Book 298, page 232, Register's Office for Williamson County, Tennessee, James I. Vance Berry, Trustee, and James T. Patterson, Jr., as sole beneficiary, conveyed certain real property to Thomas C. Mottern, Trustee, to secure the payment of a promissory note dated July 15, 1977; and,

WHEREAS, Hamilton Bank of Johnson City, as the lawful owners and holders of said indebtedness, have removed Thomas C. Mottern as Trustee under said Deed of Trust and have nominated and appointed Ralph M. Killebrew of Chattanooga, Tennessee, as Successor Trustee, pursuant to the terms of said Deed of Trust, which appointment of Successor Trustee, is of record in Book 378, page 275, Register's Office for Williamson County, Tennessee; and the said Ralph M. Killebrew, Successor Trustee,

is thereby vested with title to the property described in said Deed of Trust for all purposes therein contained, and he is clothed with all the powers, duties, and obligations therein conferred upon the named trustee; and,

WHEREAS, said Deed of Trust contained a power in the Trustee to sell the hereinafter-described property in the event of default upon the indebtedness secured thereby; and,

WHEREAS, the indebtedness described therein was not paid in accordance with its terms, but default was made thereon; and,

WHEREAS, at the request of the lawful owners and holders of the indebtedness secured by said Deed of Trust, the Successor Trustee gave notice of the time and place of sale, all in accordance with said Deed of Trust, by publishing an advertisement for three consecutive weeks in the Review-Appeal, a newspaper published in Williamson County, Tennessee, said notice being first published on Tuesday, November 4, 1980 and thereafter on Tuesday, November 11, 1980 and Tuesday, November 18, 1980; and,

WHEREAS, on the 26th day of November, 1980, at 12:00 noon, at the front door of the Williamson County Courthouse in Franklin, Tennessee, being the time and place fixed in said notice, the hereinafter described property was offered for sale at public outcry, cash in hand and in bar of the equity of redemption and all other legal rights of the grantor of said Deed of Trust, as provided therein, and after having received a bid for One Million, Seven Hundred, Fifty Thousand Dollars (\$1,750,000.00) from a representative bidding on behalf of the Hamilton Bank of Johnson City, which bid being the last, highest,

and best bid and being in hand paid, the receipt of which is hereby acknowledged;

NOW, THEREFORE, in consideration of the premises of the sum bid and paid, I, Ralph M. Killebrew, Successor Trustee, do hereby bargain, sell, transfer, and convey unto the Hamilton Bank of Johnson City, their successors and assigns, all that certain real property in Williamson County, Tennessee, described as follows:

DESCRIPTION

Being eight (8) tracts of land in the 6th Civil District of Williamson County, Tennessee, described according to a survey made by Hart-Freeland-Roberts, Inc., dated June 30, 1977 and amended July 5, 1977, as follows:

TRACT A

Beginning at a point in the southern margin of Sneed Road and the easterly margin of Temple Road; thence along the southerly margin of Sneed Road. N 54°-42'-16" E, 65.09 feet to a concrete monument; thence S 83°-26'-44" E, 501.30 feet to a point; thence S 5°-52'-16" W, 10.0 feet; thence S 84°-07'-44" E, 729.02 feet to a concrete monument; thence along a curve to the right with a radius 2744.19 a distance of 245.11 feet to a point; thence leaving the margin of Sneed Road S 6°-36'-16" W, 408.71 feet to a point in the northerly margin of St. Andrews Drive; thence along the margin of St. Andrews Drive with a curve to the left with a radius of 420.0 feet, a distance of 185.46 feet; thence N 84°-23'-44" W, 1312.50 feet; thence along a curve to the right with a radius of 25.0 feet a distance of 39.27 feet to a point on easterly margin of Temple Road; thence N 5°-36'-16" E, 334.53 feet to the point of beginning and containing 13.54 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage,

sell, transfer and convey without joinder of any beneficiary by deed from Ethel M. Grigsby, Clerk and Master of the Chancery Court at Franklin, Williamson County, Tennessee, and as Special Commissioner, of record in Book 210, page 41, Register's Office for Williamson County, Tennessee.

TRACT B

Beginning at a point on the easterly margin of Temple Road, said point being the southwest corner of the W. H. Temple Property; thence along Temple's south margin S 85°-13'-44" E, 200.05 feet; thence S 11°-00'-01" E, 348.23 feet; thence S 5°-55'-37" W, 130.0 feet; thence S 68°-45'-00" E, 278.0 feet; thence along with a curve to the right with a radius of 200.0 feet, a distance of 146.61 feet; thence S 77°-30'-00" E, 284.00 feet; thence S 13°-15'-00" W, 189.51 feet; thence S 51°-15'-0" W, 374.0 feet; thence along a curve to the right with a radius of 70.0 feet a distance of 148.63 feet; thence S 10°-50'-00" W, 373.0 feet; thence N 90°-0'-0" W, 119.00 feet; thence N 5°-0'-00" W, 486.0 feet; thence N 20°-0'-0' E, 162.0 feet; thence N 23°-45'-0" E, 398.0 feet; thence N 68°-45'-0" W, 208.0 feet; thence S 55°-43'-30" W, 422.0 feet to a point on the easterly margin of Temple Road; thence along the margin of Temple Road N 5°-36'-16" E, 790.30 feet to the point of beginning and containing 11.68 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any beneficiary by deed from Ethel M. Grigsby, Clerk and Master of the Chancery Court at Franklin, Williamson County, Tennessee, and as Special Commissioner, of record in Book 210, page 41, Register's Office for Williamson County, Tennessee.

TRACT C

Beginning at point in the southeast corner of Lot 46 and the southwest corner of Lot 45 of Temple Hills

Country Club Estates, Section I as of record in Book 5, Page 64, R.O.W.C.; thence along the easterly margin of Temple Hills Country Club Estates S 8°-49'-16" W, 26.75 feet; thence S 6°-01'-16" W, 3955.88 feet to a point on northern margin of Temple Road; thence along the northern margin of Temple Road N 83°-35'-44" W, 284.80 feet; thence along a curve to the right with a radius of 262.50 feet a distance of 299.89 feet; thence N 18°-08'-19" W, 219.89 feet to a point; thence along a curve to the left with a radius of 337.50 a distance of 149.86 feet; thence N 43°-34'-47" W, 284.77 feet; thence leaving the margin of Temple Road; N 52°-15'-13" E, 184.31 feet; thence N 14°-38'-31" E, 573.63 feet; thence N 18°-29'-01" E, 392.20 feet; thence N 18°-47'-17" E, 102.46 feet; thence N 17°-32'-01" E, 361.81 feet:

thence N 49°-28'-00" E, 124.34 feet; N 29°-34'-40" E, 85.09 feet; thence N 5°-06'-08" E, 112.45 feet; thence N 67°-18'-49" W, 437.92 feet; thence N 28°-51'-37" W, 196.73 feet; thence N 6°-24'-07" W, 371.19 feet; thence N 48°-23'-21" E, 218.05 feet; thence N 3°-15'-26" E, 246.40 feet; thence N 45°-29'-54" E, 81.32 feet; thence S 85°-22'-06" E, 281.49 feet; thence N 4°-59'-52" E, 27.84 feet; thence N 5°-49'-03" E, 266.37 feet; thence N 30°-55'-11" E, 223.81 feet; thence N 8°-59'-03" E, 256.14 feet; thence N 14°-29'-35" E, 104.57 feet; thence S 52°-20'-04" E, 432.99 feet to a point on the westerly margin of St. Andrews Drive; thence along margin of St. Andrews Drive S 37°-21'-16" W, 120.16 feet; thence along a curve to the left with a radius of 630.40 feet a distance of 88.71 feet; thence across the end of St. Andrews Drive and along the southerly margin of Lot 46 of Temple Hills Country Club Estates Section I revised, S 60°-42'-28" E, a distance of 195.96 feet to the point of beginning and containing 66.69 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any beneficiary by deed from Ethel M. Grigsby, Clerk and Mas-

ter of the Chancery Court at Franklin, Williamson County, Tennessee, and as Special Commissioner, of record in Book 210, page 41, Register's Office for Williamson County, Tennessee.

TRACT D

Beginning at a point at the end of Canterbury Lane as of recorded in Section Three of Temple Hills Country Club Estates Book 5, Page 65, R.O.W.C., said point being 89.50 feet from the southern margin of Temple Road, thence S 32°-47'-59" E, 60.0 feet across the end of Canterbury Lane; thence S 57°-12'-1" W, 3.10 feet; thence along a curve to the left with a radius of 310.90 feet a distance of 257.75 feet to a point; thence S 9°-42'-01" W, 110.0 feet; thence along a curve to the right with a radius of 473.98 feet a distance of 401.22 feet; thence S 58°-12'-1" W, 159.63 feet; thence along a curve to the right with a radius of 1148.57 feet a distance of 180.07 feet; thence S 22°-48'-51" E, 168.05 feet; thence S 73°-31'-23" W, 740.41 feet; thence N 75°-46'-20" W, 28.05 feet; thence S 5°-42'-38" E, 78.5 feet; thence S 10°-12'-14" W, 406.43 feet; thence S 63°-01'-41" W, 440.96 feet; thence S 48°-53'-30" W, 833.48 feet; thence S 31°-47'-22" E, 175.70 feet; thence along a curve to the left with a radius of 290.0 feet a distance of 432.58 feet; thence N 62°-44'-41" E, 293.04 feet; thence along a curve to the right with a radius of 240.03 feet a distance of 358.88 feet; thence N 54°-41'-20" E, 148.55 feet; thence N 42°-41'-29" E, 568.01 feet; thence N 2°-31'-06" E, 328.34 feet; thence N 36°-28'-9" E, 286.01 feet; thence N 82°-16'-41" E, 297.70 feet; thence S 81°-40'-47" E, 255.69 feet; thence S 16°-27'-31" W, 280.09 feet; thence S 41°-6'-44" W, 185.0 feet; thence S 2°-10'-29" W, 1106.80 feet; thence S 71°-19'-33" E, 515.90 feet; thence S 65°-15'-56" E, 161.26 feet; N 48°-59'-54" E, 80.0 feet; thence N 15°-33'-41" E, 144.38 feet; thence along a curve to the left with a radius of 220.0 feet a distance of 134.86 feet; thence

N 19°-33'-42" W, 53.03 feet; thence along a curve to the right with a radius of 380.0 feet; a distance of 169.94 feet; thence N 6°-3'-42" E, 27.22 feet; thence N 84°-25'-40" W, 205.97 feet; thence N 5°-11'-40" E, 386.59 feet; thence N 19°-5'-37" E, 687.83 feet; thence S 82°-5'-34" E, 290.76 feet; thence N 6°-59'-48" E, 221.65 feet; thence N 10°-45'-38" E, 93.52 feet; thence N 7°-43'-43" E, 485.90 feet to a point on the southern margin of Temple Road; thence along a curve to the left with a radius of 337.50 feet a distance of 152.50 feet; thence S 83°-35'-44" E, 300.09 feet; thence S 6°-24'-16" W, 2578.77 feet; thence N 81°-48'-44" W, 2044.04 feet; thence S 9°-56'-16" W, 35.19 feet; thence N 83°-51'-44" W, 1895.24 feet; thence N 4°-8'-16" E, 2426.23 feet; thence S 85°-21'-44" E, 853.9 feet; thence S 85°-32'-44" E, 123.96 feet; thence N 79°-3'-16" E, 393.18 feet; thence N 2°-41'-44" W, 1523.71 feet; thence N 87°-51'-33" E, 78.28 feet; thence S 49°-47'-34" E, 405.48 feet; thence S 22°-17'-21" E, 437.54 feet; thence S 66°-56'-36" E, 847.03 feet; thence along a curve to the right with a radius of 370.90 feet a distance of 261.81 feet; thence N 57°-12'-01" E, a distance of 3.10 feet to the point of beginning and containing 184.18 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any beneficiary by deed from Ethel M. Grigsby, Clerk and Master of the Chancery Court at Franklin, Williamson County, Tennessee, and Special Commissioner, of record in Book 210, Page 41, Register's Office for Williamson County, Tennessee.

TRACT E

Beginning at a point in the northerly most corner of Tract E, said point being the southwest corner of Lot 201 of Temple Hills Country Club Estates Section I as of record in Book 5, Page 4, and as revised in Book 5, page 64, R.O.W.C.; S 41°-4'-42" E, 208.82 feet

to a point on the western margin of Baltusrol Road; thence along the margin of Baltusrol Road, S 48°-55'-18" W, 145.0 feet to a point; thence crossing Baltusrol Road, and along the southern margin of Lot 162 S 41°-4'-42" E, a distance of 209.12 feet; thence S 48°-55'-18" W, 131.14 feet; thence S 8°-9'-34" W, 1143.73 feet; thence S 46°-47'-39" E, 610.53 feet; thence N 84°-17'-22" E, 170.85 feet; thence S 3°-29'-22" W, 168.64 feet; thence S 42°-10'-36" W, 62.26 feet; thence 43°-27'-07" W, 774.91 feet; thence S 84°-50'-53" W, 122.5 feet; thence S 4°-6'-47" W, 136.27 feet; thence S 2°-59'-14" E, 690.94 feet; thence S 83°-53'-05" W, 168.96 feet; thence S 38°-06'-27" W, 114.59 feet; thence N 49°-47'-34" W, 332.65 feet; thence N 9°-01'-10" E, 677.28 feet; thence N 3°-48'-51" E, 225.50 feet; thence N 5°-20'-46" E, 251.25 feet; thence N 4°-28'-13" E, 551.68 feet; thence N 43°-13'-43" W, 68.62 feet; thence N 64°-34'-23" W, 67.54 feet; thence N 31°-44'-34" W, 138.76 feet; thence N 18°-43'-15" E, 190.06 feet; thence N 46°-2'-29" E, 155.59 feet; thence N 2°-51'-48" W, 40.05 feet; thence N 13°-07'-15" E, 713.63 feet; thence N 8°-41'-10" E, 364.18 feet; thence N 45°-00'-00" E, 197.99 feet; thence N 44°-01'-06" E, 171.63 feet to the point of beginning and containing 42.57 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any beneficiary by deed from Ethel M. Grigsby, Clerk and Master of the Chancery Court at Franklin, Williamson County, Tennessee, and as Special Commissioner, of record in Book 210, page 41, Register's Office for Williamson County, Tennessee, and also being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any beneficiary by deed from R. W. Steltemeier and wife, Ramona S. Steltemeier, of record in Book 210, page 48, Register's Office for Williamson County, Tennessee.

TRACT F

Beginning at a point on the southern margin of Temple Road and the eastern margin of the William Wilson property, thence along the southern margin of Sneed Road S 83°-32'-44" E, a distance of 530.0 feet to a point; thence leaving the margin of Sneed Road S 17°-38'-32" W, 696.08 feet; thence S 25°-26'-59" W, 668.0 feet; thence N 85°-36'-04" W, 130.38 feet to a point on the eastern margin of the William Wilson property; thence along the margin of the Wilson property N 4°-24'-16" E, 1320.0 feet to the point of beginning and containing 10.70 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any beneficiary by deed from R. W. Steltemeier and wife Ramona S. Steltemeier, of record in Book 210, page 48, Register's Office for Williamson County, Tennessee.

TRACT G

Beginning at a point on the southern margin of Tract E, said point being S 49°-47'-34" E, 151.75 feet from the southwest corner of Tract E; thence along the southern margin of Tract E S 49°-47'-34" E, 50.0 feet; thence leaving the margin of Tract E S 38°-06'-27" W, 41.27 feet; thence along a curve to the left with a radius of 155.0 feet a distance of 10.58 feet to a point on the northerly margin of Tract D; thence along the northerly margin of Tract D, N 49°-47'-34" W, 50.21 feet; thence leaving the margin of Tract D and along a curve to the right with a radius of 205.0 feet a distance of 8.72 feet; thence N 38°-06'-27" E, 43.1 feet to the point of beginning and containing 0.06 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any bene-

ficiary by deed from R. W. Steltemeier and wife, Ramona S. Steltemeier, of record in Book 210, page 48, Register's Office for Williamson County, Tennessee.

TRACT H

Beginning at a point on the westerly margin of Temple Road, said point being 3146.86 feet from the southerly margin of Sneed Road as measured along the westerly margin of Temple Road; thence along the margin of Temple Road S 5°-36'-16" W, 100.0 feet; thence leaving Temple Road and along a curve to the left with a radius of 25.0 feet a distance of 39.27 feet; thence N 84°-23'-44" W, 55.50 feet to a point on the easterly margin of Tract E; thence along the margin of Tract E, N 42°-10'-36" E, 62.26 feet; thence leaving the margin of Tract E, S 84°-23'-44" E, 18.41 feet; thence along a curve to the left with a radius of 25.0 feet a distance of 39.27 feet to the point of beginning and containing 0.09 acres.

Being a portion of the property conveyed to James I. Vance Berry, Trustee, with full power to mortgage, sell, transfer and convey without joinder of any beneficiary by deed from R. W. Steltemeier and wife, Ramona S. Steltemeier, of record in Book 210, page 48, Register's Office for Williamson County, Tennessee.

Included in the above description, but specifically excluded from the property conveyed is the following described property:

1. All of Section 4.
2. All of Section 5.
3. Lot 113, Section 1.
4. Lots 238 through 245 and 266 through 272, Temple Hills, Section 6.

5. All of Section 1 which are Lots 471 through 485.
6. The Natchez Trace Property in Tract D which by a government order of condemnation was made into the Natchez Trace Parkway. The order is filed in the Williamson County Circuit Court #10810.

TOGETHER WITH:

The right of the Grantors of said Deed of Trust to rely upon the real property described in Exhibit "A" to that certain Open Space Easement, dated June 19, 1973, of record in Book 210, page 57, said Register's Office, as common area in support of the Planned Residential Development of the eight (8) tracts above described and other lands of Grantors of said Deed of Trust.

TOGETHER with all the estate, right, title, interest, claim and demand whatsoever of Grantors of said Deed of Trust of, in and to said real estate and every part and parcel thereof;

TOGETHER with all buildings, structures and other improvements now or hereafter located on the said real estate or any part or parcel thereof;

TOGETHER with all right, title and interest of Grantors of said Deed of Trust in and to the minerals, flowers, shrubs, crops, trees, timber and other emblements now or hereafter located on said real estate or under or above the same, or any part or parcel thereof;

TOGETHER with all and singular the tenements, hereditaments, easements, privileges and appurtenances thereunto belonging or in anywise appertaining, including any after acquired property similar to that herein conveyed which may be subsequently acquired by the Grantors of said Deed of Trust and used by them in connection

with the above-described real estate, and including without limitation, all right, title and interest of Grantors of said Deed of Trust in and to any and all streets, roads, and rights-of-way, open or proposed, public or private, adjoining or crossing said above-described real estate.

TOGETHER with all machinery, apparatus, building materials, equipment, fixtures, fittings, furnishings and appliances of every kind and nature owned by Grantors of said Deed of Trust and now or hereafter located in, upon, on or under the above-described real estate or any part thereof and/or used or usable in connection with any present or future operation thereof, whether actually or constructively attached to said above-described real estate, and including all trade, domestic and ornamental fixtures and articles of personal property of every kind and nature whatsoever, including but without limiting the generality of the foregoing: venetian blinds, floor coverings, draperies, hot water heaters, stoves, ranges, refrigerators, plumbing appliances, dishwashing machines, washing machines, light fixtures, lighting equipment, heating, ventilating, fire control, freezing, laundry, incinerating, power and air conditioning units or appliances, awnings, screens, storm doors and windows, wall beds, attached cabinets, engines, pipes, pumps, tanks, motors, conduits, switchboards, lifting, cleaning and communications apparatus, sewage treatment plants, facilities and apparatus, vacuum cleaning systems, elevators, escalators, partitions, ducts and compressors, furniture and furnishings, parking lot lighting fixtures and such other goods, chattels, personal property, fixtures and equipment as are usually found on real estate of the character hereby conveyed, together with all addi-

tions thereto, replacements thereof, (substitutions therefor and proceeds from a permitted sale thereof) all of which property shall to the extent permitted by applicable law be considered as annexed to or forming a part of said above-described real estate and forming a portion of the security for the indebtedness secured by the Deed of Trust dated July 15, 1977;

TOGETHER with all right, title and interest of Grantors of said Deed of Trust, from time to time, in and to any and all leases, contract, franchises and licenses covering the above-described real estate, now belonging or hereafter acquired or added thereto;

TOGETHER with all rents, issues, and profits which shall hereafter be realized, become due, or be paid in connection with the operation and use of said above-described real estate;

TOGETHER with all building materials and supplies on the premises described above and all fixtures and personal property of every kind and description whatsoever and all my interests therein by virtue of said Deed of Trust.

TO HAVE AND TO HOLD said real estate, together with all hereditaments, easements, appurtenances, and improvements thereunto belonging, in fee simple, forever, free from all right and equity of redemption and all other legal rights of exemptions of the grantor of said Deed of Trust.

I, Ralph M. Killebrew, as Successor Trustee, do hereby transfer, assign, and set over unto the Hamilton Bank of Johnson City, their successors and assigns, all of the

covenants and warranties contained in said Deed of Trust, and I do hereby warrant the title as fully as I am able to do as Successor Trustee, but no further or otherwise.

WITNESS my hand, as Successor Trustee, on this the 11th day of December, 1980.

/s/ Ralph M. Killebrew,
Successor Trustee

State of Tennessee, County of Davidson, ss

Before me, the undersigned, a Notary Public in and for the aforesaid County and State, personally appeared Ralph M. Killebrew, the within named bargainor, with whom I am personally acquainted and who, upon oath, acknowledged himself to be the Successor Trustee named herein, and that he, as Successor Trustee, executed the foregoing instrument for the purposes therein contained, and that the actual consideration or value, whichever is greater, for this transfer is \$1,750,000.00.

WITNESS my hand and official seal at office in Nashville, Tennessee on this the 11th day of December, 1980.

/s/ Rugenia Russe
Notary Public

My Commission Expires: July 21, 1984

THIS INSTRUMENT PREPARED BY:

BASS, BERRY & SIMS
2700 First American Center,
Nashville, Tennessee 37238

DEFENDANT'S EXHIBIT 66
(Plaintiff's Exhibit 1009)

DEFENDANT'S EXHIBIT 84
(Plaintiff's Exhibit 1056)

DEFENDANT'S EXHIBIT 93
(Plaintiff's Exhibit 1073)

DEFENDANT'S EXHIBIT 105
MINUTES OF THE MEETING
OF THE
WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION
MAY 7, 1981

Members Present:

Mitchell Beard
Carolyn Waters
Ann Petersen
Joey Davis
Pete Mosely
Ken McNeil
Joe Baugh
Judge Wilburn H. Kelley, Jr.
Jack Meagher
Dr. Robert Medaugh

Staff Present:

Morton Stein, County Planner
Thayer Martin, County Engineer

Don Santer, Building Commissioner
Mitchell Crawford, County Attorney

The meeting of the May 7, 1981 Planning Commission was called to order by chairman Mitchell Beard at 7:40 p.m.

The commission then considered the minutes of the March 19, 1981 Planning Commission meeting. Ken McNeil pointed out a correction to be made on page 2, second paragraph. The word Blbe should be Blue. Mr. Stein stated that this sentence needed to be added to the Item II heading—MASTER PLAN APPROVED AS PRELIMINARY PLAT AND DELAYED ACTION ON FINAL PLAT. Also, on page three, between paragraph's seven and eight, add a paragraph stating that the Planning Commission then considered Final Plat of Section V. Ken McNeil made a motion to approve the minutes of the March 19, 1981 meeting as amended. Ann Petersen seconded the motion; motion carried.

Announcements:

Mr. Stein announced that there will be a meeting Tuesday, May 12 at 7:00 p.m. of the Special Water Study Committee with the County Commission members to explain their recommendations.

ITEM I: REVIEW FINAL DRAFT OF THE WILLIAMSON COUNTY DEVELOPMENT PLAN, WATER AND WASTEWATER PLAN AND ADOPT PLAN.

Representative for Harry Hendon and Associates, Stan Nelson, gave a presentation on the Water Portion of the Williamson County Water, Wastewater and Development Plan.

They recommend that all utility districts within the county be consolidated and that the county water authorities undertake construction of the Hillsboro Road Groundwater Treatment Plant and the South Harpeth River Water Treatment Plant in phases.

There were questions and discussion from the planning commission. The staff made a recommendation that the planning commission adopt the Water Portion of the Williamson County Development Plan, Water and Wastewater Plan.

Ken McNeil made a motion to adopt the attached resolution. Jack Meagher seconded the motion; motion carried.

Mr. Dave Buchanan of the Special Water Study Committee reported on the results of their study. Mr. Buchanan stated that their committee was recommending four resolutions to the County Commissioners: (1) to direct County Attorney to take such steps as necessary to consolidate the six rural utility districts, (2) reorganize County Water Authority to allow election of six commissioners by County Commission, (3) dissolution of existing Water Authority and (4) extend length of special water committee. He presented a resolution for consolidation of the six county water districts. Mr. Buchanan explained just how this consolidation would affect the people of the city and county. Motion was made to adopt the attached resolution by Dr. Robert Medaugh. Joey Davis seconded the motion; motion carried.

ITEM II: PRESENTATION OF PROPOSED SKETCH PLAN FOR THE TEMPLE HILLS DEVELOPMENT BY THE DEVELOPER.

Mr. Kilebrew, representing Hamilton Bank of Johnson City gave an informal presentation to the planning commission concerning their proposed future development of Temple Hills. He reported on the history of this development.

Mr. Roy Coffee presented the commission with a petition containing approximately 162 signatures of the homeowners backing the development. Several residents attended the meeting supporting the development. There was also some opposing the development.

There were several comments and questions from the citizens and the planning commission.

Mr. Killebrew ended the presentation thanking everyone for listening and attending.

ITEM III: REVIEW OF THE FOLLOWING SUBDIVISION BONDS

Mr. Martin gave a presentation on the following:

**PERFORMANCE
BONDS:**

Hidden Valley
Settlers Point
Owl Creek
Sneed Glen
Breckenridge II
Battlewood Forrest
Farmington
Hunters Ridge II

**MAINTENANCE
BONDS:**

Iroquois Meadows
In-A-Vale
Wildwood Estates II
Highgate II and IV
Trace End I and II

Representatives from some of the subdivisions attended the meeting to give their comments concerning the work to be done.

Hidden Valley: Motion made by Joey Davis to defer action until the next meeting. Pete Mosely seconded the motion; motion carried.

Settlers Point: Motion made by Pete Mosely to go to a Maintenance Bond provided the paving and stabilization work is completed on or before May 27 and that the amount be \$7,500. Dr. Robert Medaugh seconded the motion; motion carried.

Owl Creek: Motion was made by Ann Petersen to defer until the next meeting. Ken McNeil seconded the motion; motion carried.

Sneed Glen: Motion made by Ann Petersen to extend the bond until September 23. Jack Meagher seconded the motion; motion carried.

Motion was made by Judge Kelley to defer the remaining bonds until the next Planning Commission meeting. Pete Mosely seconded the motion; motion carried.

With no further business to come before the commission the meeting adjourned at 10:35 p.m.

/s/ Ann Petersen
Ann Petersen, Secretary

ENCLOSURE FOR ITEM III

SUBDIVISION	TYPE BOND	DATE DUE	DATE LAST ACTION	DATE FINAL APPROVED	EXTENSION
Performance Bonds					
Hidden Valley	L/C	6-1-81	10-80	1974	7 years
Settlers Point	L/C	6-10-81	10-80	1978	7 months
Owl Creek	Insurance	6-1-81	11-80	1978	9 months
Sneed Glen	Savings Account	6-7-81	5-80	1977	1 year
Breckenridge II	L/C	6-13-81	5-80	1978	1 year
Battlewood Forrest	Insurance	6-16-81	5-80	1978	1 year
Farmington	Insurance	6-16-81	5-80	1978	1 year
Hunters Ridge II	L/C	6-19-81	5-80	1979	1 year
Maintenance Bonds					
Iroquois Meadows	Insurance	6-1-81	6-80	1977	1 year
Trace End Estates I & II	Insurance	6-1-81	10-80	1975	1 year
In-A-Vale	L/C	6-1-81	11-80	1978	•
Wildwood Estates II	L/C	6-1-81	11-80	1974	5 years
Hightgate II	L/C	6-1-81	12-80	1974	none
Hightgate IV	L/C	6-1-81	6-80	1977	2 years

• Maintenance period ends Nov. 1981—Staff request certain work to be performed by June 1981.

RESOLUTION ADOPTING WATER
STUDY PORTION OF COUNTY DEVELOPMENT
PLAN FOR WILLIAMSON COUNTY

MAY 7, 1981

WHEREAS, Williamson County has suffered severe water problems in recent years; and,

WHEREAS, the concept of County-wide cooperation in solving water supply problems has been supported and promoted by the Mid-Cumberland Council of Governments and FmHA; and,

WHEREAS, after recognizing the tremendous need for a comprehensive water plan, FmHA and County Government agreed to finance the development of a plan; and,

WHEREAS, County Officials and FmHA representatives realize the excessive costs and duplications involved when attempts are made to solve water problems on a piecemeal basis in crisis situations; and,

WHEREAS, the well-being of the County and its citizens is better served financially and with better services when the primary energies of County Government and its planning efforts are directed toward developing and implementing well planned, carefully considered strategies rather than being occupied with problem solving and crisis intervention; and,

WHEREAS, the Williamson County Board of Commissioners has retained Harry Hendon and Associates as consultants to do the planning and engineering in preparing a comprehensive county development plan with emphasis on determining the future water needs, available sources and best methods of distribution to ensure that adequate water is available to the citizens, businesses and industries of our County; and,

WHEREAS, said engineers have completed the water study and presented it for approval; and,

WHEREAS, the Planning Commission has reviewed the study and plan; and,

WHEREAS, the Planning Commission finds this plan to be both cost-effective and in line with the best planning principals (sic) expressed in its policy statements;

NOW, THEREFORE, BE IT RESOLVED, for the Williamson County Regional Planning Commission to adopt the Williamson County Water Plan portion of the County Development Plan, dated 5/6/81, prepared by Harry Hendon and Associates and promote the completion and fulfillment of this plan.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION

Mitchell Beard, Chairman

Ann Petersen, Secretary

COUNTY COMMISSION SPECIAL WATER
STUDY COMMITTEE REPORT
PRESENTED ON MAY 7, 1981
TO
WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION

The proposals of the County Commission Special Water Study Committee pertaining to:

1. consolidation or unification of the six (6) rural water districts, and
2. re-structuring of the Williamson County Water Treatment Authority

have been reviewed by the Williamson County Regional Planning Commission and are consistent with the adopted Water Study Portion of the County Development Plan.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION

Mitchell Beard, Chairman

Ann Petersen, Secretary

TEMPLE HILLS COUNTRY CLUB ESTATES

RESUME' OF PLANNING PROBLEMS
AS SEEN BY A NUMBER OF RESIDENTS

MAY 6, 1981

OPEN SPACE

Background

Since Temple Hills Country Club Estates was originally approved as an Open Space Residential Development, one of the key features that must be understood and monitored is the relationship of the open space to the residents of the development and to the community. In the initial presentation to the Planning Commission of this plat, 469 lots and a 260-acre golf course were shown with large portions left to be developed later. The accompanying covenants which were also approved by the Planning Commission and the Quarterly Court describe the open space as being of two types:

"Art. I

2. Common Area(s) shall mean and refer to any and all real property owned by the Association, or such other property to which the Association may hold legal title, whether in fee or for a term of years, for the prior and superior, but non-exclusive, use, benefit and enjoyment of the members of the Association subject to the provisions of this Declaration, together with those areas shown reserved for the golf course, tennis courts, club house, and supporting grounds and facilities located at or near the club house, including the swimming pool, title of which shall be vested in Temple Hills Country Club and the use of which shall be available on a membership basis."

Throughout the Covenants are numerous references to those common areas to be owned, used, and maintained by the residents. The whole legal framework follows the guidelines of the Open Space Ordinance of a development that intended to deed open space to the homeowners. Article IV, Section Four affirmed the basic purpose of an open space quoting the ordinance directly:

"Any provision to the contrary in these Restrictive Covenants or elsewhere notwithstanding, the Common Area shall not be used except for one or more of the following uses or purposes:

- (1) Recreational facilities, the primary purpose of which is to serve the residents of Temple Hills Country Club Estates.
- (2) Historic sites.
- (3) Parks and parkway areas.
- (4) Natural sites worthy of scenic preservation."

To understand how carefully the Planning Commission supervised the writing of these Covenants and how vital it considered open space for the residents, please read carefully the second page of the letter written June 7, 1973 to Mr. Berry concerning these matters. . . . Clearly, a private golf course alone would not have qualified Temple Hills as an open space community.

Subsequently, in 1977 these covenants were amended without the knowledge of all residents. These amendments clearly violated the basic concept of the open space residential development, but reflected the reality of the sale of the golf course. Recreational facilities serving the residents and the membership of Temple Hills Country Club was in reality serving only the membership of the club.

While it may have been wise not to transfer title of common areas to the homeowners until there was an established community, it was clearly Mr. Callicott's impression that "certain areas will be designated thereon as common areas or open space and then the golf club (country club property) is otherwise designated." Certainly by incorporating all the provisions for common areas owned by the homeowners in the covenants, the developers showed both the buyers and the Planning Commission the intent to transfer such title. To now develop all those undefined areas without consideration to the common areas calls into question the validity of this as an Open Space Residential Development.

On a practical level, lack of common areas has not been crucial to the first sections of this development. Most of the lots have been one-half-acre or greater. Even the condominiums have only 28 of the platted 38 built, and they will be only 60% as dense as those submitted by Hamilton Bank.

However, the need for common areas becomes acute if 55 and 65 families are clustered in 5-to-the-acre sections. Note one such cluster is bounded by a creek, the golf course, and Sneed road, while several others are surrounded by the golf course which is off limits to children and non-members. (See enclosed letter B). Mr. Ralph Killebrew indicated at a recent Homeowners meeting that the new plat will be used to provide multi-family units for young families who cannot afford a single family home. Such marketing makes the golf course a less viable open space, for its facilities are inappropriate and out of the price range of the people it is to serve.

A Suggestion

A possible solution to this impasse would be to include within each of the major clusters some recreational areas appropriate to the families served. The original platting concept for condominiums in Temple Hills included such an area and these units may well have been sold today if such a feature still existed. Some of the units have been vacant for over two years and 10 more have been platted since 1974.

Before any plat is approved by this planning commission, the whole issue of open space should be examined, for you are charged under the Ordinance with "seeing that it be satisfactory" as to "location", "size of each such area and the specific uses of each area." If Hamilton Bank hopes to benefit from the approval given the preliminary plat in 1973, it should at least meet the requirements of the Ordinance under which it was approved and fulfill the covenants which were also a part of that approval.

June 7, 1973

Mr. James I. Vance Berry
Attorney at Law
American Trust Building, 7th floor
Nashville, Tennessee 37201

Re: Temple Hills Country Club Estates

Dear Vance:

I have examined somewhat hurriedly the copy of Temple Hills Country Club Estates Restrictive Covenants which you delivered to me yesterday. We have discussed the matter briefly over the telephone.

As you know, I have been somewhat concerned that absolute safeguards be established for the preservation of open space permanently as required by the zoning regulations. This same question arose in my consideration of the Covenants, etc., submitted by John D. Whalley and Martin Zeitlin who are developing Cottonwood Estates also as a Cluster Development. Their covenants as originally submitted did not specifically provide what uses were permissible in the open space area nor were they in my opinion adequate for the purpose of insuring and guaranteeing that the open space would remain such permanently.

I drafted and submitted to them an open article to be inserted in their Covenants and also an Open Space Easement to be executed by the owners and to be recorded.

I enclose for your consideration a copy of these two instruments. I was assured by Mr. Zeitlin and by Mr. J. J. Foley, Jr., his attorney, that these documents were satisfactory and would be incorporated in their legal papers.

The four uses are taken word for word from the zoning regulations. While the zoning regulations do not specifically provide for any sort of structure on open space, it is my feeling that they do impliedly permit structures which are purely incidental to one or more of the uses permitted. Certain structures incidental to golf clubs, historic sites, parks, etc., are in many cases certainly desired if not absolutely necessary. In this connection, it should be mentioned that, at the time the open space easement is conveyed, title should be free and unencumbered (except for current taxes) or if there are liens on the property the lien holder should join in the easement or certainly execute a subordination agreement to be recorded.

I also call your attention to the fact that not only do the regulations provide that the primary purpose of recreational facilities is to serve the residents of the Cluster Development but further provides that plans for open spaces must be presented to and approved by the Planning Commission along with assurance that liability insurance will be in force, taxes paid and "the property otherwise maintained for the benefit of the residents of the Cluster Development or the public generally".

It would appear from the provisions above referred to that certainly the residents of the development should have first or prior rights to the use of all open spaces even though a part of that open space be used for a golf club, membership of which would include both lot owners and members of the public. Actually it could be argued that the requirement that the open space be maintained for the benefit of the residents of the Cluster Development or the public generally would prevent the use of a golf club on the open space such as is contemplated in this development because there would be selected members of the public admitted into the club whereas the public generally would not have use of the facilities.

The above considerations prompt me to suggest that there be some change made in Article I, Definitions, and in Article VIII, Temple Hills Country Club. While the common areas are to be used "for the non-exclusive use, benefit and enjoyment of the members of the association" and the property and facilities of the Country Club are to be used "for the non-exclusive use of lot holders and others" it does appear to me that the Planning Commission should insist certainly that lot holders be given prior

and superior rights to the use of the common area and to the right of membership in the country club.

There would still remain some question in my own mind as to whether the regulations do not contemplate that all the open space must be maintained either for the benefit of the residents of the Cluster Development or for the public generally or for both the residents and the public generally.

I further call your attention to the fact that, as I remember the preliminary plat which was last approved, certain areas will be designated thereon as common areas or open space and then the golf club (country club property) is otherwise designated, for the purpose of zoning regulations, all of the property except the lots shall constitute open space.

Vance, I also call your attention to Article IX, General Provisions, Section 2, Amendment. I feel that there must be some mistake in the choice of language used there, if I understand the real meaning of it. As it reads, the developer alone, so long as he owns one or more lots, can amend the Covenants and Restrictions but if he no longer owns one or more lots then two-thirds of the lot owners can perfect an amendment. I feel that you must have intended to state that so long as the developer owns one or more lots amendments may be made by agreement signed by the developer and by two-thirds of the owners of lots and then after the developer has sold all his lots amendment may be made by the signatures of two-thirds of the lot owners. If my understanding of what you intended is correct I believe the language needs refining.

With warm regards, I am

Yours very truly,
 Claude Callicott
 Secretary
 Williamson County Planning
 Commission

CC/jwh

TEMPLE HILLS HOMEOWNERS' ASSOCIATION

To: All Temple Hills Homeowners April 12, 1980

Mr. Roy Shainberg recently contacted me regarding a problem he was having on the golf course, namely that of children playing on the course. He explained that the children posed two problems, first and foremost the children are in danger of being seriously hurt by errant golf balls, and secondly they tend to disrupt orderly play by the golfers.

Roy further pointed out that he was somewhat "between a rock and a hard spot" because if he takes any stern or forceful action he runs the risk of being condemned as "un-neighborly", while if he were to take no action and a child were to be hurt, he might be accused of being negligent.

We must point out to our children the dangers of playing on the golf course and remind them that they should not play on the course. Your help and cooperation will be greatly appreciated by all.

/s/ Edward Ditomas
 Interim Chairman
 Temple Hills Homeowners'
 Association

cc: Mr. Roy Shainberg

February 12, 1973
 (Dictated February 10, 1973)

Mr. Lytle Brown
 Hart, Freeland & Roberts
 J. C. Bradford Building
 Nashville, Tennessee 37219

Re: Temple Hills County Club Estates

Dear Lytle:

At its meeting of February 1, 1973, the Williamson County Planning Commission approved the initial sketch plat of Temple Hills Country Club Estates which you have for development under the Cluster Zoning regulations.

Lytle, I realize that you are working under the direction of the property owners and developers and must, within reason, prepare your plats in accordance with their instructions. However, I do want you to know that I was extremely disappointed in the initial sketch which you presented on their behalf at the February 1 meeting. As you know, it was and is my feeling that the plat does not conform to the density provisions of the regulations. I could of course be in error in my interpretation of the provisions but, even if I am in error as to the interpretation, I still feel that the density is too great and that the Commission as a matter of policy should require that plat to be revised so as not to contain more units than would be permitted if the property were being developed under the regulations pertaining to conventional subdivisions. While I am still of the firm opinion as to the true intention and interpretation of the density provisions of the regulations,

even if I am in error, still the Commission has very broad and discretionary powers with respect to the regulations pertaining to Cluster developments and the Commission is not bound to approve a plat merely because it meets the minimum requirements of the law.

Furthermore, in my opinion the plat does not at all embody the true concept of Cluster Zoning. This plat shows several streets with long rows of narrow lots with no access whatsoever to open spaces. I have given considerable thought and study to the matter of Cluster Zoning and have seen various and sundry plats and photographs of such developments elsewhere and I am firmly convinced that we should have some such developments in Williamson County. To me it (is) highly important that we preserve many open spaces in the county and this method of development, properly used, will help to attain such objective. If, however, the Cluster Zoning regulations are simply used by the subdividers as a pretext or sham for reducing set-back lines and minimum lot sizes and widths of roads, without affording the lot owners and the community as a whole the benefits of true Cluster development, great and lasting harm can be done to our county. On the same night that your plat was presented another initial sketch was presented of a subdivision entitled Cottonwood Estates and a comparison of these two plats reveals a marked difference, that being in favor of the Cottonwood Estates plat. In that plat substantially all if not all of the lots provide access to open spaces and a development under that plat would in my opinion be attractive and unobjectionable.

It is my personal feeling that this plat should be sent back to you and the property owners for further study

before final approval. I also call your attention to the other provisions of the regulations, particularly those relating to open spaces and requiring that all suitable and proper measures be taken to guarantee the permanent preservation of said open spaces.

Assuring you of my warm personal regards, I am

Yours very truly,

Claude Callicott

Secretary

Williamson County Planning
Commission

CC/jwh

DENSITY

The Planning Commission has the responsibility to apply the relevant Zoning Ordinances to the new plat submitted for Temple Hills. The only legal question is whether the original or the current ordinances govern the undeveloped sections. Without the Open Space Residential Article, this development could never have been approved and it cannot be outside of its provisions. There is nothing in the law that indicates density can be calculated any way other than that outlined in the Ordinance, nor can any requirements with regard to density be waived.

Now the question is which Ordinance to apply to the land now owned by Hamilton Bank and any subsequent owner or developer. This land is listed and taxed as woodlands. While some of it was platted in the original preliminary plat as half-acre lots, much of it has never had a pattern of roads or lot lines approved, minimum requirements by definition of a plat. At no time have

more than 507 lots been given preliminary approval. This number is well within the provisions of both the old and new Ordinance. Under no provision of the law can the County Planner grant approval of lots by letter or his personal interpretation of a plat. Also, note that with the exception of the utilities to the sales office, no improvements have been made to this property since its original presentation as an idea in 1972.

While there has been much discussion of the notation at the top of the preliminary plat —

“Allowable dwelling units for total development 736” — this is merely a conversion of the total acreage to a 40,000 Sq. Ft. acre which was the standard used in 1973. It assumes a perfect 676 acres of buildable land which Temple Hills is not. It is also contradicted by such notations as:

“Parcels with note ‘This parcel not to be developed until approval by the Planning Commission’ not a part of this plat and not included in gross area.”

“Actual dwelling units presented this sketch plan 469.”

It is also interesting to note the new plat being presented ignores the specifications that were a part of the original approval:

“(2) All lots to have minimum frontage of 115 feet on a public road and to be approximately 18,000 square feet.”

These specifications were presented to both the Planning Commission and to those of us who purchased lots as part of the plan for this development. We were also shown both the printed brochure (see enclosure) and the drawings

for all of the 469 lots in the original plat. All lots on St. Andrews, North Berwick, Prestwick, and Green Brier were single family dwellings on one-half-acre lots. Since property has been sold under these specifications and within this design, how can changes be made without the approval of all?

Unfortunately, neither the original Planning Commission nor the original developers wanted to deal with the question of density. Both avoided the difficult land areas and stayed well within the maximum number of units. They left the decision to your good judgment with the note:

“Not to be developed without Planning Commission approval.”

In finding a solution to this complex issue, please apply the principles of good planning you would use in any development in Williamson County. Consider the health, the safety, and the welfare of the present and future residents of this development, its neighbors and the county as a whole. Consider these issues:

These clusters will be among the most densely populated spots in the county.

- (a) When the roads are deeded to the County, will the cluster unit exceed the 5-to-the-acre limitation in the Ordinance?
- (b) Is there adequate fire protection or could a small fire in the night become a tragedy for many families?
- (c) Will St. Andrews and Temple Road adequately handle the traffic of either construction or established population? If not, who will provide such roads?

- (d) If the average family in the clusters includes one child, is there adequate space for those children or is a major social problem being created?

There are a few legal issues you might also consider:

- (a) Please review the covenants to see the nature of the problem if there are two developers in Temple Hills Country Club Estates.
- (b) How do you determine that the undeveloped land of one developer is single family dwellings and that of the other is multi-family clusters?
- (c) Can you approve lots that are above the 25% grade? Have you anticipated the chaos if these lots are to be argued one-by-one and then moved to other sections of the plat?

What if such lots are sold to a new developer who buys them in good faith?

- (d) How can you reconsider a plat you have already found unacceptable for another developer?

Good development is vital to all of us in Williamson County. It can happen in Temple Hills Country Club Estates if it meets the standards outlined in the Ordinances and Regulations in the county and those established in the original presentation of this development. A good developer would want to meet the present standards if he is to have a competitive product. Poor enforcement of the standard leads to endless debates about waivers, precedents, and exceptions to the rules. The time, energy, and resources of all could be better spent in building a good community.

(MAP OMITTED)

DEFENDANT'S EXHIBIT 109

10. *Common Space*—At least twenty percent (20%) of the total acreage of a mobile home park shall be allotted to common space, which shall be for the general use of residents of the mobile home park. Such common space may be used for central service buildings, playgrounds, swimming pools, recreation areas, community buildings or any combination thereof.

ARTICLE XI

OPEN SPACE RESIDENTIAL DEVELOPMENTS

1. *Purpose*—The purpose of this provision is to allow the grouping of housing units within a development and incorporate permanent open space into such developments. The basic concept is that housing units may be grouped in clusters, rather than being evenly spaced on uniform sized lots throughout the development, thereby allowing greater creativity, flexibility and economy in residential development, at the same time achieving the scenic quality of open space.
2. *Preliminary Site Plan*—A preliminary site at a scale of 1 inch to 100 feet plan must be submitted to the Williamson County Regional Planning Commission. The preliminary site plan shall provide the following information:
 - a. Boundaries and acreage to the site
 - b. Number of dwelling units and their basic designs
 - c. Arrangement of streets, structures and lots
 - d. Access to existing streets
 - e. Open space tracts and proposed uses

- f. Any commercial service area .
- g. Location and size of water and sewer lines
- h. Location of fire hydrants.

3. *Procedure for Approval*—The following procedure shall be followed in obtaining approval of an Open Space Residential Development:

- a. A preliminary site plan and supporting data shall be submitted to the Williamson County Regional Planning Commission. The Planning Commission may require such other data, including market analyses, financial reports, and traffic studies, as it shall deem advisable.
- b. The Williamson County Regional Planning Commission shall review the preliminary site plan and supporting data and approve or disapprove the plan.

4. *Character of Development*—A proposed Open Space Residential Development should create an attractive residential environment and enhance the economic stability of the community in which the development is located and the county generally. Such a development should be compatible with the overall land use of the area. A developer must present to the Planning Commission such information as it may require to determine that a proposed development will in fact be attractive, enhance the economic stability and be compatible to other developments in the area. If the Planning Commission should determine that a proposed development would not be attractive, enhance the economic stability of the area or be compatible to other developments in the area, it may decline to approve such a proposed development.

5. *Density*—The density of an open space residential development shall be no greater than the density allowed under the zoning classification as set forth in the Zoning Resolution applicable to the area being developed. In no event shall such density be more than one (1) dwelling unit per acre. In computing the permitted density in a development, the gross acres in the tract of land to be developed shall first be reduced by ten percent (10%) to allow for streets and utilities. The remaining land area shall be further reduced by fifty percent (50%) of the land lying in the flood plane and still further reduced by fifty percent (50%) of the land lying on a slope with a grade in excess of twenty-five percent (25%).

6. *Maximum Units*—In no event shall there be more than five (5) living units built upon any acre of buildable land.

7. *Buildable Land*—Living units shall be built only upon buildable land. Buildable land includes all land except:

- a. Land lying within a flood plain as shown on an official flood study.
- b. Land lying on steep hillsides with a grade in excess of twenty-five percent (25%).
- c. Land with severe soil limitations.
- d. Land which is, in the opinion of the Williamson County Planning Commission, considered to be undevelopable.

Non-buildable land shall be allocated to and included in open space.

8. *Permitted Uses*—Within an open space residential development, on the buildable land there may be built:

- a. Single and two-family dwellings.
- b. Multiple family housing units.
- c. Commercial facilities, the primary purpose of which is to serve the residents of the open space residential development.

Open Space may be used for the following purposes:

- a. Recreational facilities, the primary purpose of which is to serve the residents of the open space residential development.
- b. Historic sites.
- c. Parks and parkway areas.
- d. Natural sites worthy of scenic preservation.

Further, areas of rough terrain or low land in the flood plain which are deemed to be unfit for development by the Planning Commission must be allocated to open space.

9. *Development Requirements*—A minimum number of housing units per Open Space Residential Development shall be fifty (50). Each such development shall be served by both public water and by a modern sewer system approved by the Health Department of the State of Tennessee, the Health Department of Williamson County, Tennessee, and by the Planning Commission. With the approval of the Williamson County Planning Commission and the Williamson County Highway Commission, public roads in an open space residential development may vary from those specifications contained in the Williamson County Subdivision Regulations. Such approval shall be in writing and noted on the final plat. It is the intent of this paragraph to permit streets and street patterns to be

compatible with the topographical conditions of the area and the overall design of the Open Space Residential development. All streets must be public except those providing direct access to apartments and condominiums.

10. *Setback Lines*—The minimum setback lines provided by the general zoning regulations for the zone in which such Open Space Residential Development is authorized shall apply to all existing roads and all exterior property lines. All remaining setback lines are to be as required or as approved by the Planning Commission.
11. *Open Space*—Open space in an Open Space Residential Development may be retained by the developer, or deeded to a homeowner's association or other organization approved by the Planning Commission. Regardless of whether open space is retained by the developer or deeded to a home owners association or other organization, plans for improvement and maintenance of open space must be presented to and approved by the Planning Commission along with assurance that liability insurance will be in force, taxes paid, and the property otherwise maintained for the benefit of the residents of the Open Space Residential Development and the public generally. Further, the developer must present assurance to the Planning Commission that the land shall be used permanently as open space and that there will be no subdivision of said open space.

If open space is to be deeded to a homeowners association, the developer shall present to the Planning

Commission the legal framework of the homeowners association, including articles of incorporation and by-laws. Further, if open space is to be deeded to a homeowners association, the developer shall include in the deeds to individual lots mandatory membership in the homeowners association.

The areas set aside or allotted to open spaces must, as a condition precedent to approval, be satisfactory to the Planning Commission as to location, size of each such area and the specific uses for each such area. Distances between buildings shall be as required by the Planning Commission.

12. *Application*—This provision shall apply to all zones in which residential uses are permitted as designated and defined by this Zoning Resolution. Provided, however, every open space residential development shall be approved by the Williamson County Quarterly Court.

ARTICLE XII

AUTOMOBILE STORAGE

1. *Purpose*—The purpose of this section of the Zoning Resolution of Williamson County is to insure that every lot in Williamson County provides adequate parking for the use being carried on the lot.
2. *Minimum Standards*—Automobile storage facilities shall be provided on all lots in Williamson County. The parking area shall be in accordance with the following minimum standards:
 - a. *Amusement Places*—One (1) parking space for each employee, plus one (1) parking space for each three (3) patron seats.

- b. *Apartments*—Two (2) parking spaces for each dwelling unit.
 - c. *Churches*—One (1) parking space for every five (5) seats.
 - d. *Dining Places*—One (1) parking space for each employee, plus one (1) parking space for each two (2) patron seats.
 - e. *Dwelling*—Two (2) parking spaces for each dwelling unit.
 - f. *Funeral Home*—One (1) parking space for each five (5) seats, or, in case of no fixed seats, one (1) parking space for every fifty (50) square feet of chapel space.
 - g. *Hospitals*—One parking space for each four (4) beds, plus one (1) parking space for each doctor and one (1) parking space for each nurse and other employee.
 - h. *Hotels and Motels*—One (1) parking space for each room, plus one (1) parking space for every two (2) employees.
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EDITOR'S NOTE

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No. 84-4

Office: Supreme Court, U.S.
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ALEXANDER L. STEVAB.
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In The
Supreme Court of the United States

October Term, 1984

— 0 —
**WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et. al,**

Petitioner,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

— 0 —
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

— 0 —
JOINT APPENDIX

Volume III, Pages 422 to 427

— 0 —
**ROBERT L. ESTES
M. MILTON SWEENEY**
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Bank Building
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Counsel for Petitioner

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Counsel for Respondent

— 0 —
PETITION FOR CERTIORARI FILED JULY 2, 1984
CERTIORARI GRANTED OCTOBER 1, 1984
— 0 —

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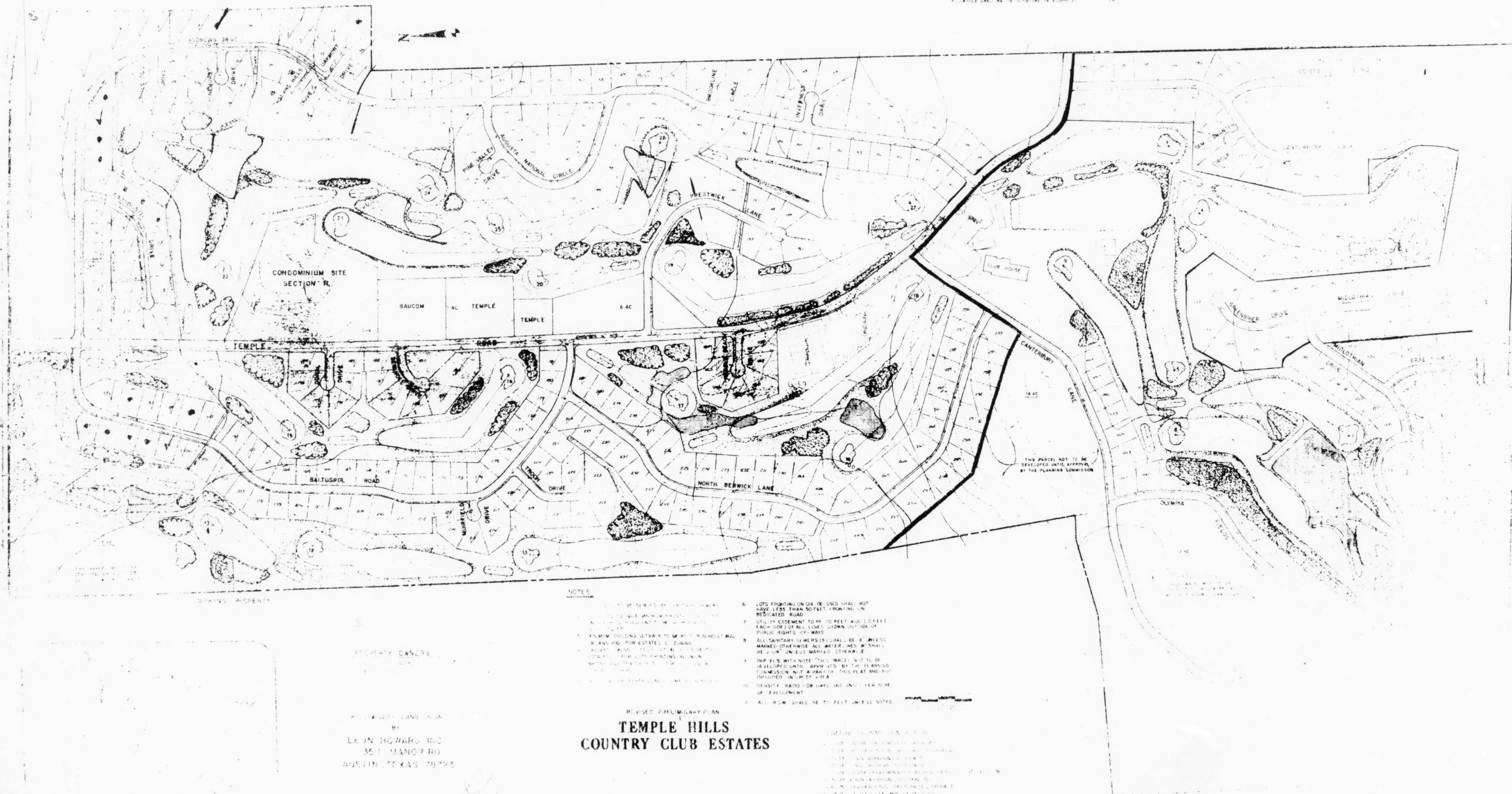
Plaintiffs' Exhibits:

9700	422
9701	423
9702 (Front)	424
9702 (Back)	425
9707	426
9708	427

TOTAL PROJECT - 676 ACRES

GOLF COURSE & OPEN SPACES 160 AC
DWELLING UNITS 287 AC
AREA FOR FUTURE DEVELOPMENT 29 AC

1. DWELLING UNITS FOR TOTAL DEVELOPMENT
2. DWELLING UNITS EXCLUSIVE OF REVENUE RATES
3. DWELLING UNITS PRESENTED THIS INITIAL PLAT FOR FUTURE DEVELOPMENT



NOTES

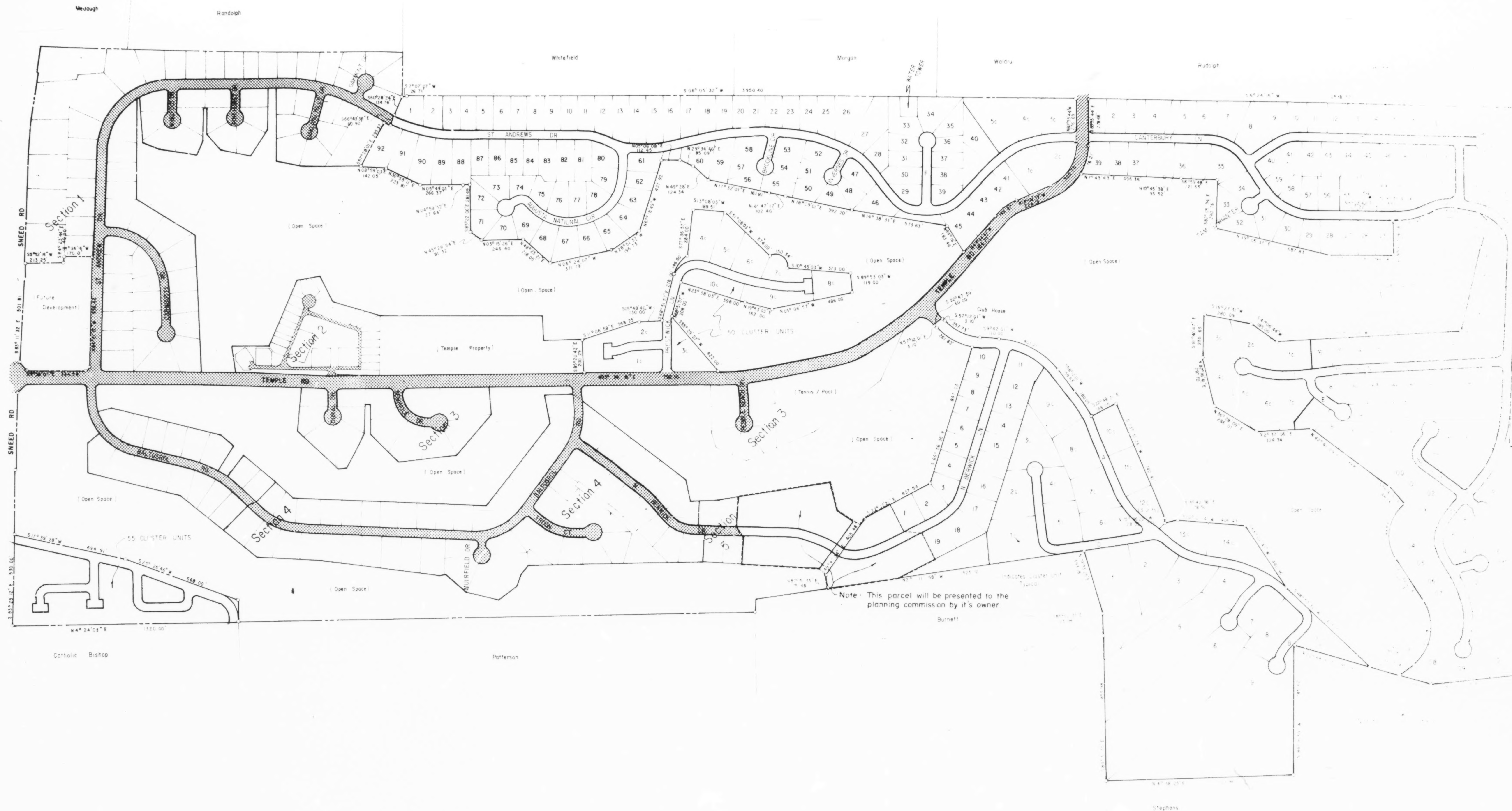
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REVISED PRELIMINARY PLAN
**TEMPLE HILLS
COUNTRY CLUB ESTATES**

ENGRS:
STANFORD & ASSOC. INC.
FRANKLIN, TENNESSEE

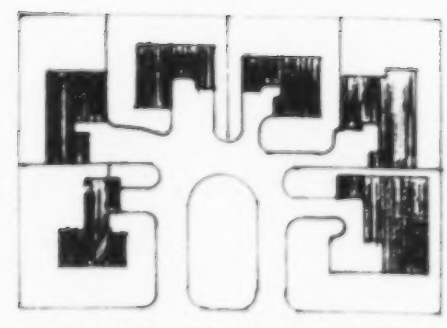
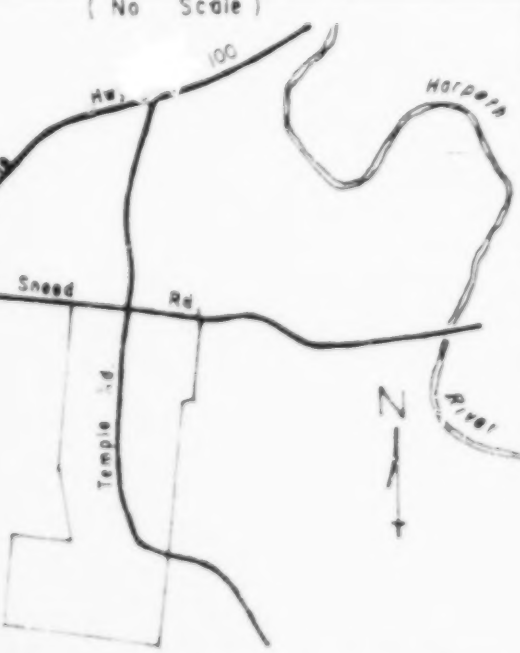
SCALE 1" = 200'

DATE 5-10-74



Note: This parcel will be presented to the planning commission by its owner.

LOCATION MAP



TYPICAL CLUSTER UNIT
(Not to Scale)

Temple Hills Country Club

Property Owner: Hamilton Bank of Jackson City

Hamilton Bank Property = 257.65 Ac

Total Acres = 657.5 Ac

Total Number of Units = 688

688 Units

Note: All Cluster Units are 1/2 acre, unless otherwise noted.

Medaugh

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Whitefield

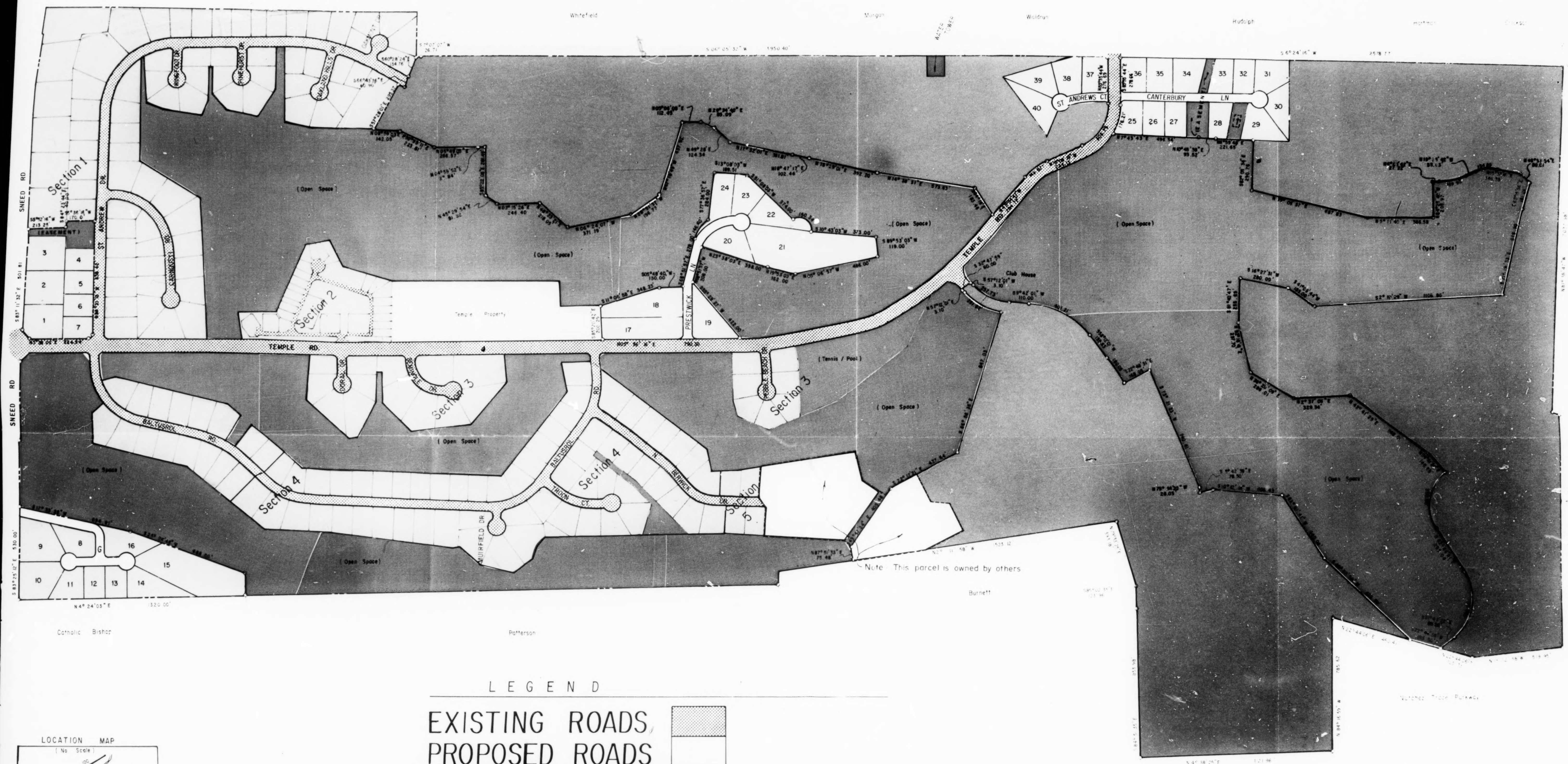
Morgan

Waldron

Rudolph

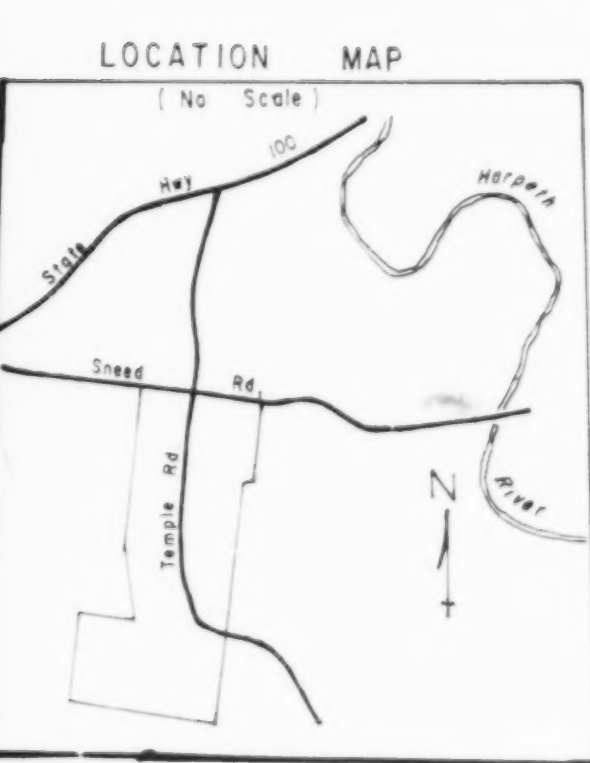
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LEGEND

- EXISTING ROADS
- PROPOSED ROADS
- DEVELOPED UNITS
- OPEN SPACE
- REMAINING LOTS TO BE DEVELOPED
- AREAS ELIMINATED BY THE PLANNING COMMISSION



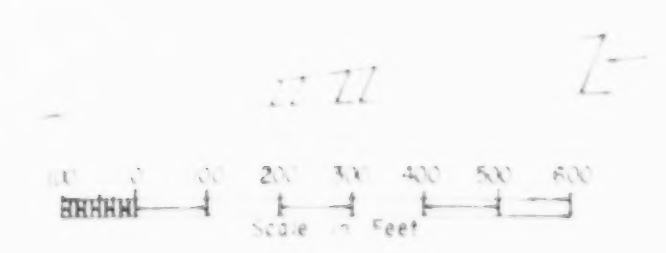
Temple Hills Country Club Estates

Property Owner: Hamilton Bank of Johnson City

Existing Lots = 212
Proposed Lots = 40
Total = 252

Hamilton Bank Property = 257.65 Ac.
Total Acres = 657.5 Ac.

6th Civil District
Williamson County, Tennessee

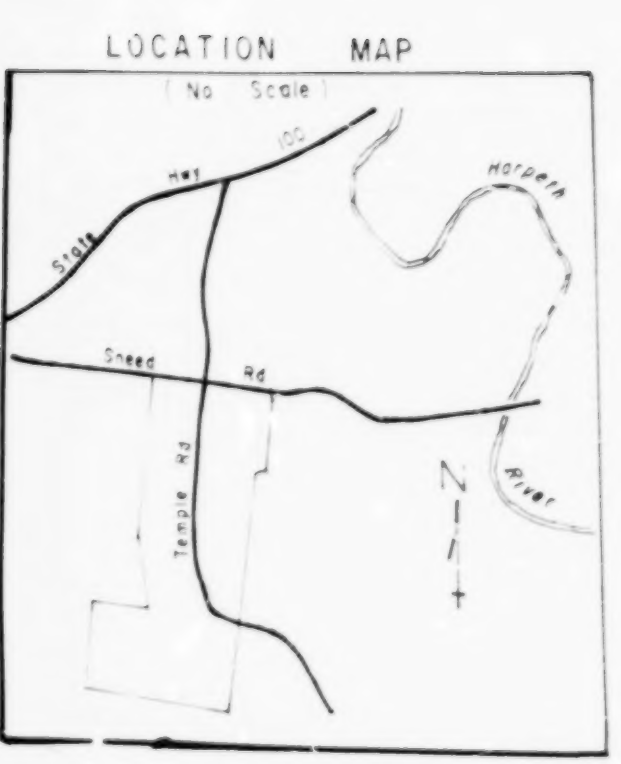


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R51-3561-N



LEGEND

EXISTING ROADS	
PROPOSED ROADS	
DEVELOPED UNITS	
OPEN SPACE	
REMAINING LOTS TO BE DEVELOPED	
AREAS ELIMINATED BY THE PLANNING COMMISSION	



Temple Hills Country Club Estates
 Property Owner: Hamilton Bank of Johnson City
 Hamilton Bank Property = 257.65 Ac.
 Total Acres = 657.5 Ac.
 6th Civil District
 Williamson County, Tennessee

Existing Lots = 212
 Proposed Lots = 67
 Total = 279

(13)
No. 84-4

Office - Supreme Court, U.S.

FILED

DEC 13 1984

ALEXANDER L. STEVAS.

CLERK

In The
Supreme Court of the United States
October Term, 1984

— o —
WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, et al.,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

— o —
On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

— o —
**BRIEF OF AMICUS CURIAE
PACIFIC LEGAL FOUNDATION IN
SUPPORT OF RESPONDENT**

Of Counsel

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Pacific Legal Foundation

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No. 84-4

In The
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WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, et al.,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

**BRIEF OF AMICUS CURIAE
PACIFIC LEGAL FOUNDATION IN
SUPPORT OF RESPONDENT**

INTEREST OF AMICUS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of respondent. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting broad public interest. Policy for Pacific Legal Foundation is established by an independent Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only when it concludes that Pacific Legal Foundation's position has broad support within the general community. Pacific Legal Foundation's Board of Trustees has authorized the filing of this brief.

The Just Compensation Clause of the Fifth Amendment to the United States Constitution, which was made applicable to the states by the Fourteenth Amendment, was intended to ensure that individual owners of private property are not compelled by government action to bear burdens that should rightfully be borne by the public as a whole. If individual rights in property are to be preserved the constitutional guarantee that just compensation must be paid when private property is taken by government must be applied to situations in which a taking results from government regulation of the use of property, even if the taking is temporary because the regulation is rescinded.

Pacific Legal Foundation's public policy perspective in support of private property rights will help provide this Court with a more complete briefing of the interests at stake in this litigation.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 729 F.2d 402 (6th Cir. 1984). A copy of that opinion is reproduced in the Joint Appendix (JA).

STATEMENT OF THE CASE

Respondent, Hamilton Bank of Johnson City (Hamilton Bank), is the successor in interest of a land developer who in 1973 submitted a preliminary plat for a proposed residential development covering 676 acres. Petitioner, Williamson County Regional Planning Commission (Commission), approved the preliminary plat in May of 1973, although there was some dispute as to how many lots were actually approved at that time. The plat bore a notation stating that the number of allowable dwelling units for the total development was 736. However, the plat actually showed lot lines for only 469 units on 287 of the 416 acres that were designated for residential development. No lot lines were drawn for the remaining 129 acres and the plat bore the additional notation that these were "not to be developed until approved by the planning commission." In June of 1975, the preliminary plat for the development was revised and reapproved.

After approval of the preliminary plat, development of the project began. Pursuant to Tennessee law, before construction was actually started on a section, a final plat map was submitted to the Commission for approval. Between 1973 and 1979 the Commission approved several final plats.

In 1977 the Williamson County zoning regulations were amended. However, the Commission continued to apply the prior regulations to the development and in 1978 renewed approval of the preliminary plat. In April of 1979 the preliminary plat was renewed for an additional year. That same year, the Commission decided to apply then-existing regulations to further development approvals rather than those regulations which were in effect when initial approval had been given.

In October of 1980 the developer again submitted the preliminary plat for approval. However, the Commission disapproved the plat for noncompliance with density requirements in current regulations and because lots were placed on slopes greater than 25%. The following month Hamilton Bank, through foreclosure, acquired the property that had not been developed and sold.

In June, 1981, Hamilton Bank submitted a preliminary plat which was substantially similar to the plat previously disapproved by the Commission. The Commission disapproved this plat during that same month. Hamilton Bank then filed this suit in the United States District Court for the Middle District of Tennessee. The complaint set forth numerous claims, among which was a claim that Hamilton Bank's property had been taken without the payment of just compensation in violation of the United States Constitution, and a claim that under the state common law the Commission was estopped from not allowing the project to proceed.

After trial to a jury, a verdict with answers to special interrogatories was returned in favor of Hamilton Bank. The jury found that Hamilton Bank had been

denied economically viable use of its property and that the Commission was estopped under state law from requiring Hamilton Bank to comply with current zoning regulations as opposed to the regulations in effect in 1973. The jury returned a verdict of damages in the amount of \$350,000 for the temporary taking of Hamilton Bank's property for the period from disapproval of the plat in 1980, to the date of its estoppel verdict.

Subsequently the District Court granted the Commission's motion for judgment notwithstanding the verdict on the taking issue. Although the District Court found the evidence was sufficient to support the verdict that Hamilton Bank had been denied economically viable use of its property, it held as a matter of law that "such a temporary denial" does not constitute a taking under the Fifth Amendment. JA at 41. On Hamilton Bank's appeal from the judgment notwithstanding the verdict, the United States Court of Appeals for the Sixth Circuit reversed, with one judge dissenting. The Court of Appeals concluded that the jury's finding that the Commission deprived Hamilton Bank of economically viable use of its property was supported by the evidence and the judgment notwithstanding the verdict was improper. The Court of Appeals concluded that under a theory of a temporary taking the award of damages was appropriate and the amount of \$350,000 was supported by the evidence.

SUMMARY OF ARGUMENT

1. Denial of all economically viable use of property by government is a "taking" requiring payment of just compensation notwithstanding the fact that the denial is temporary. The jury determination of the factual basis establishing a temporary taking is not open to question at this time since the Commission did not assert error on these matters.

2. The legitimate claim of Hamilton Bank to use of its property, arising from a reasonable expectation created by state law and the actions of the Commission, is a "property interest" within the contemplation of the Just Compensation Clause.

3. Fulfilling the command of the Fifth Amendment that property owners be justly compensated when their property is taken by regulation will not deprive local governments of discretion in land use matters. The property owner may be compensated by the return of the use of the property and monetary compensation for the period during which he or she was deprived of the use of the property.

ARGUMENT

I

THE TEMPORARY INTERFERENCE WITH A RECOGNIZED PROPERTY INTER- EST MAY REQUIRE JUST COMPENSATION TO ACHIEVE THE PURPOSES OF THE FIFTH AMENDMENT

The Fifth Amendment guarantee that private property will not be taken for a public use without the payment of just compensation was "designed to bar Government from forcing some people alone to bear public burdens

which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Although this Court has wrestled with the question of what constitutes a taking on many occasions, *Ruckelshaus v. Monsanto Co.*, — U.S. —, 104 S. Ct. 2862, 2874 (1984), it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). However, this Court's decisions on the Just Compensation Clause have resulted in rules which support the claim for compensation in this case.

It has long been settled that "a taking" of property can occur by means other than governmental acquisition or destruction of the property. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes writing for the Court acknowledged that "[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law." *Id.* at 413. However, he concluded that

"[t]he general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Under the rule announced by Justice Holmes a determination of a "taking" is a "question of degree." *Id.* at 416. In more recent cases this Court has further articulated the standards by which a police power regulation of the use of land is to be judged to determine if the degree of regulation has gone "too far." In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court stated

that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or [if it] denies an owner economically viable use of his land" *Id.* at 260 (citations omitted). In applying this standard to the *Agins* case, this Court concluded that it could not hold that the Tiburon ordinance effected a taking. The ordinance "substantially advance[d] legitimate governmental goals," *id.* at 261, and since the property owners had not sought approval to develop their property they were "free to pursue their reasonable investment expectations." *Id.* at 262.

Applying the *Agins* standard to this case leads to the opposite result. Hamilton Bank submitted a plan to develop its property which was disapproved for reasons which the Court of Appeals concluded would imply disapproval for any plan which would fulfill Hamilton Bank's reasonable investment backed expectations. *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d at 408 n.7. Additionally, after a full trial on the matter the jury returned a verdict that Hamilton Bank had been denied economically viable use of its property. JA at 37. The District Court acknowledged that there was evidence to support the jury's conclusion. However, it reasoned that the Commission was entitled to judgment notwithstanding the verdict because the result of the jury's verdict on the state common law estoppel issue would be that the denial of economic use was only temporary. JA at 41. The District Court's reasoning is unsupported by law. A taking of property is not made any less of a taking simply because it is temporary. *San Diego Gas & Electric Co. v. City of San*

Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting). The temporary nature of the taking is only relevant to the amount of compensation to which the property owner is entitled. *United States v. Causby*, 328 U.S. 256, 268 (1946).

The jury's verdict that Hamilton Bank had been denied viable economic use of its property remains undisturbed. It is too late in the day for the Commission to attack that finding. The Commission's motion for new trial was denied by the District Court on the basis that the evidence supported the conclusion that Hamilton Bank had been temporarily denied economically viable use of its property and "the relevant facts to which the question of the law applies . . . could not be further or more fairly developed." JA at 41. The Commission did not seek appellate review of this portion of the judgment.¹ There is no question at this point as to whether Hamilton Bank's property was temporarily taken. The only issue to be considered is whether the Just Compensation Clause mandates that Hamilton Bank be compensated.

This question must be answered affirmatively. The requirement that just compensation be paid when private property is taken is imposed by a self-executing constitutional provision. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 654 (Brennan, J., dissenting),

¹ Pursuant to Federal Rules of Civil Procedure, Rule 50(c) (1), the judgment of the District Court included a conditional denial of the Commission's motion for new trial of the issues decided by the jury. JA at 41. The Commission has not "assert[ed] error in that denial" as provided by Rule 50(c) (1) by perfecting an appeal, see Petition for Writ of Certiorari at 9, or by asserting this error in its appellate brief or its petition for rehearing. The Commission's arguments before the Court of Appeals were limited to support for the judgment notwithstanding the verdict.

citing *United States v. Clarke*, 445 U.S. 253, 257 (1980). The Court of Appeals and the District Court both recognized that the current regulations, the application of which denied Hamilton Bank viable economic use of its property, serve a legitimate state interest. *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d at 405; JA at 39-40. For this reason it is assumed that the public benefited from the application of the regulations to Hamilton Bank's property. Whichever way this Court decides this case, it will not change the established fact that the public has enjoyed the benefit from the denial of an important property interest of the Hamilton Bank's. Likewise the decision in this case cannot change the basic fact that someone must pay for the benefits the public enjoyed by bearing the unavoidable costs. This case can only determine whether Hamilton Bank alone must bear the costs of the public benefits or the public at large will share in those costs. It is preferred as a matter of public policy as well as a principle of law that the burdens and costs should be fairly distributed through the payment of some kind of just compensation.

"If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,' it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it." *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 656-57 (Brennan, J., dissenting).

The guiding principle of the Just Compensation Clause is that a property owner be put in as good a position as he or she would have occupied had his or her

property not been taken. *United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 633 (1961). Since an interest in the use of property cannot be restored for any time of use which has passed, only monetary compensation for the value of lost time of use can place the owner in a position as good as that he or she would have occupied had the taking not occurred. See *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 657 (Brennan, J., dissenting).

II

A PROTECTED INTEREST, BASED UPON A REASONABLE AND LEGITIMATE EXPECTATION OF A PROPERTY OWNER TO MAKE USE OF HIS PROPERTY, MAY NOT BE DESTROYED BY LAND USE REGULATION WITHOUT PAYMENT OF JUST COMPENSATION

"Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'" *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Although this Court has noted that "'property interests . . . are not created by the constitution,'" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), some property interests are so essential to our notion of property that they are "universally held to be a fundamental element of the property right," *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), and "serious constitutional questions might be raised" if the state attempted to redefine those interests in a general manner. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 94-95 (1980), (Marshall, J. concurring).

The right of an individual to prevent the permanent occupation of his or her property by others is an example of such a fundamental interest. Any time this interest is taken by government action, the property owner must be compensated. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 441. The right of a property owner to some reasonable use of his or her property is another such fundamental interest, and if this interest is taken by government the property owner must be compensated. *Agins v. City of Tiburon*, 447 U.S. at 260. On top of the foundation of such fundamental property rights the state through its statutory and common law builds the edifice of interests which become the recognized structure of property in that state. A property owner is entitled to rely upon this structure of property and to employ the Due Process and Just Compensation Clauses to protect his or her claims to these interests.

In the area of land use regulation it is axiomatic that a property owner does not have an absolute right to put his or her property to any particular use. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Nonetheless a property interest may arise from an "independent source." *Board of Regents v. Roth*, 408 U.S. at 577. Once such an interest exists "fairness and justice" require that the cost of depriving the property owner of this right "should be borne by the public as a whole." See *Armstrong v. United States*, *supra*.

This Court has established extensive jurisprudence on the question of when such a "property interest" arises under the Due Process Clause. In *Board of Regents v. Roth*, 408 U.S. 564, this Court stated that "[p]roperty interests . . . are not created by the Constitution. Rather,

they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* at 577. To establish the existence of a protected interest "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id.* Such a "claim of entitlement" can be created expressly by statute, *id.* at 561, or implied by government action. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972). If, under all of the circumstances of a given case, government action has given rise to a legitimate claim of entitlement to a certain use, a property interest exists and it cannot be denied without the procedural protection required by the Due Process Clause. *Goldberg v. Kelly*, 397 U.S. 254 (1970). The same interest is entitled to the protection of the Just Compensation Clause. For constitutional protections property is property.

In *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), Justice Stewart, writing for the Court, stated:

"Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized." *Id.* at 552 (citations omitted).

Inasmuch as the Due Process Clause and the Just Compensation Clause were both intended to protect personal rights in "property," the same test should be utilized

to determine when a property interest exists for purposes of either clause.

Ruckelshaus v. Monsanto Co., *supra*, one of the most recent decisions of this Court applying the Just Compensation Clause, is an example of a case in which this Court applied the legitimate expectation analysis to the question of whether a "taking" occurred. In *Ruckelshaus*, a pesticide manufacturer challenged the data disclosure provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, alleging that disclosure of data provided to the Environmental Protection Agency (EPA) constituted a "taking" of property without just compensation, in violation of the Fifth Amendment. This Court considered whether under the circumstances of that case the manufacturer had a legitimate expectation that its data would be kept confidential when submitted to the EPA. This Court concluded that for the period from 1972 to 1978, the manufacturer did have such an expectation, which resulted from an explicit guarantee by the federal government that data provided by the manufacturer would be kept confidential. EPA's consideration or disclosure of data submitted under this guarantee would constitute a taking of a property interest. 104 S. Ct. at 2879. Since Monsanto's protected interest arose from its legitimate expectation that its data were to be confidential, no protected interest existed for the years after the guarantee of confidentiality was revoked. *Id.* In refusing to apply a 1975 statutory provision purporting to carry backward the guarantee of confidentiality to years prior to 1972, this Court emphasized that the protected interest is created by "the expectations of the submitter," which cannot be changed after the fact. *Id.* at 2879 n.17.

Application of this test to this case establishes that Hamilton Bank is entitled to compensation. The District Court instructed the jury on the state common law estoppel issue as follows:

"[I]f you find that [Hamilton] in good faith made a substantial change in position or incurred extensive obligations and expenses in reliance upon the previous approval of the Temple Hills project by the [planning commission] so that it would be inequitable and unjust to destroy the right to develop Temple Hills which [Hamilton] had acquired, then you should . . . find that the [planning commission] was estopped or prevented from exercising [its] regulatory powers in such a way as to deprive [Hamilton] the right to develop the Temple Hills project." *Hamilton Bank v. Williamson County Regional Planning Commission*, 729 F.2d at 406-07.

The jury returned a verdict that the Commission was estopped under state law from requiring Hamilton Bank to comply with post-1973 zoning regulations. Therefore, it must have found that Hamilton Bank had, as a matter of state law, a legitimate expectation, resulting from the Commission's prior actions, that it was entitled to develop its property. This legitimate claim constitutes a property interest and inasmuch as the Commission's actions deprive Hamilton Bank of its expectation, Hamilton Bank is entitled to compensation.

"It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. at 577. If government for the sake of the public good interferes with the "claims upon which people [have relied]" it is

only just and fair that the public as a whole bear a fair share of the burden of the cost of that interference.

III

CLEAR STANDARDS FOR THE JUST COMPENSATION OF INDIVIDUALS WHOSE PROPERTY HAS BEEN TAKEN WILL AID, NOT DESTROY, LOCAL GOVERNMENT DISCRETION IN LAND USE MATTERS

Although "various policy considerations," *see Agins v. City of Tiburon*, 24 Cal. 3d 266, 275-76 (1979), *aff'd*, 447 U.S. 255 (1980), have been argued against monetary damages as an appropriate remedy when property is "taken" by an exercise of the police power, these policy considerations do not justify the circumvention of a constitutionally guaranteed right. Essentially, these "policy considerations" concern preserving local governments' discretion in the area of land use planning and protecting local governments' treasuries.

Similar policy considerations were rejected in *Owen v. City of Independence*, 445 U.S. 622 (1980), in which this Court held that municipalities have no immunity from liability under 42 U.S.C. § 1983 and that they cannot assert the good faith of their officers as a defense to such liability. In *Owen* this Court stated:

"First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. [Citation omitted.] More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials.

Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his action.'" *Id.* at 656 (emphasis in original).

Recognizing these policy concerns, Justice Brennan in his dissent in *San Diego Gas & Electric Co. v. City of San Diego*, *supra*, proposed a constitutional rule that "once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 450 U.S. at 658 (Brennan, J., dissenting). This suggestion was made in response to the property owner's claim that the government had to condemn its property and pay market value after a police power regulation had effected a taking. *Id.*

This description suggests a flexible approach to determining what compensation would be just in each case and it undercuts the "policy considerations" which are the basis for the arguments presented to this Court that uncompensated takings of private property should be allowed to ensure a high degree of flexibility in governmental decision making. Nonetheless, those who oppose awarding monetary damages for regulatory takings insist that holding municipalities accountable for constitutional violations

will deprive local governments of discretion in land use matters. See *Amici Curiae Brief of State of California ex rel. John K. Van de Kamp, Attorney General, and California Coastal Commission, the Tahoe Regional Planning Agency, the States of Alaska, Florida, Iowa, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, North Carolina, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, Wyoming, and the Territory of American Samoa* at 14.

These arguments refuse to recognize that the guiding principle of just compensation is merely to put the property owner in as good a position as he or she would have occupied had his or her property not been taken. *United States v. Virginia Electric and Power Co.*, 365 U.S. at 633. In most situations this would mean payment of the full monetary equivalent of the property taken. See *United States v. Reynolds*, 397 U.S. 1416 (1970). In many cases such as this one, the owner has not been deprived of the permanent use of his or her property. The restoration to the owner of the ability to make reasonable use of the property leaves only the need for the payment of damages for the period during which the owner was deprived of the use of the property.

Such a result does not disable local governments from maintaining their discretion in deciding local land use matters. If the government entity imposing the regulation determines that continuing the regulation, despite the fact that it works a taking, serves the best interest of the community, it can formally condemn the property. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. at 659-60 (Brennan, J., dissenting).

Property owners have good reason to fear if their remedies are limited to giving local government entities the alternative either to cease the regulation or to condemn the property. *Id.* at 655 n.22. Interim damages are necessary for adequate protection, especially from the abuses of regulators, whose ire has been raised by litigation. In the absence of a "set formula" for a judicial determination of when a taking occurs, the property owner can never be certain that enough requests for approval have been made and denied to establish that the municipality intends to allow no economically viable use. The "land use game" can stretch out for years as the municipality, facing no liability for its conduct, rejects this or that aspect of a proposed use. Even after final approvals have been given and substantial investments in a use have been made, approvals may be withdrawn, and the burden will still rest on the landowner to prove that regardless of the conduct of the municipality the landowner has created a "vested right" to proceed. See, e.g., *Santa Monica Pines, Ltd. v. Rent Control Board*, 35 Cal. 3d 858 (1984). Such uncertainty is an attribute of a governmental privilege, not of a property right.

Consistent application of the legitimate expectation analysis to the area of land use will provide a much-needed increase in the degree of certainty associated with land use decisions. Examining not only the conduct of the landowner in creating a "vested right," but also the conduct of the municipality in creating a "legitimate expectation" will spread the burden associated with conduct to both sides and will provide a brighter line between that regulation which requires compensation and that which does not. The brighter line will assist the balance of interests and allow local governments discretion to determine the best

interests of their communities while affording property owners the full protection of the Fifth Amendment for their reasonable and legitimate expectations associated with their personal rights in the use and enjoyment of private property.

CONCLUSION

The Just Compensation Clause of the Fifth Amendment mandates that when private property is "taken" the property owner is to be compensated. This self-executing constitutional provision must not be circumvented for expedient "policy considerations." If, as in this case, a property owner is denied economically viable use of property or a legitimate expectation in use of property so as to bestow a benefit on the public as a whole, justice and fairness require that the public as a whole bear a reasonable share of the costs associated with that benefit.

For the foregoing reasons *amicus curiae*, Pacific Legal Foundation, respectfully urges that the decision of the Court of Appeals be affirmed.

December 12, 1984.

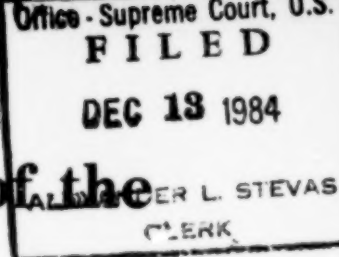
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12
No. 84-4

**In the Supreme Court of the
United States**

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL.,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FC & THE SIXTH CIRCUIT.

**BRIEF OF
CALIFORNIA BUILDING INDUSTRY ASSOCIA-
TION AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

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No. 84-4

**In the Supreme Court of the
United States**

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL.,

Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

**BRIEF OF
CALIFORNIA BUILDING INDUSTRY ASSOCIA-
TION AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT**

With consent of the parties, The California Building Industry Association (CBIA) respectfully submits this brief as *amicus curiae* in support of the Respondent.

**INTEREST OF AMICUS CURIAE
AND NATURE OF THE PROBLEM ADDRESSED**

CBIA is an umbrella organization representing some 5,000 company members of seven regional Building Industry Associations throughout California. As an organization of homebuilders, CBIA is vitally concerned with the impact of harsh land use

regulations which, however motivated, at once impact adversely on its members' economic interests and on the availability of housing, particularly housing that is affordable to those in the lower income brackets and increasingly to the middle class.¹ CBIA is concerned that, as is alarmingly evident in California (but by no means confined to it), harsh land use restrictions often simply prevent housing construction and thus effectively bar entry not only into desirable suburbs, but also into homeownership altogether by the young, the middle class, and particularly minorities. For an enlightening, concise and lucid insight of a noted scholar into the gritty realities of the use of professedly high-minded land use regulations, see Frieden, "The Environmental Protection Hustle," 1979, MIT Press, passim. On a more philosophical level, see Tucker, "Progress and Privilege: America in an Age of Environmentalism", Anchor Press/Doubleday, 1982.

In sum, CBIA finds itself in a position where in the context of the issues at bench, the self-interest of its members coincides with the interest of the population in the area served by it, and — it is forcefully submitted — with the public interest. In the final analysis, CBIA is interested in building homes for people who need them. So is a growing segment of the population that is priced out of home ownership, and thereby sentenced, as it were, to protracted or permanent status as a sort of an apartment renter underclass.² It is in the public interest to provide increased — not shrunken — housing opportunities for

¹It is by now a fact of judicially noticeable proportions that California has the most expensive housing in the Nation. Much of this cost, some 18-20% in the San Francisco Bay area, for example, is attributable to land use regulations, such as growth controls and moratoria. Katz and Rosen, *The Effects of Land Use Controls on Housing Prices*, at p.47, Working Paper 80-13, Center for Real Estate and Urban Economics, University of California, Berkeley. The problem, moreover, is increasingly present beyond California; see Report of the President's Commission on Housing (1982), particularly Chap. 13, "Government Regulation and the Cost of Housing", pp. 1-5 *et seq.*

²See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-395 (1926).

that population. Effective — not theoretical — remedies for excessive, use-stultifying land use regulations will help provide such opportunities.

SUMMARY OF ARGUMENT

CBIA respectfully urges that the court reject the dogmatic importunings of the Petitioner and its *amici*, of the tenor that "just compensation" expressly provided for by the Takings Clause of the Constitution, or damages explicitly authorized by 42 U.S.C. § 1983,³ nonetheless be made unavailable for regulatory takings. It is respectfully suggested that the Court reaffirm instead the pragmatic and flexible approach which (depending on the factual circumstances of the governmentally - inflicted wrong) would provide damages⁴, or in cases where the government acts wholly extra-legally and the harm is purely prospective, specific relief⁵, or a combination of both, as outlined in Mr. Justice Brennan's opinion in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

The reasons for the position espoused by this *amicus* are:

First, the "just compensation" remedy is explicitly provided for in the Constitution, and is as surely applicable to partial and temporary takings as to others.⁶

³Since § 1983 explicitly provides for "an action at law," one is baffled how such arguments are made with a straight face (see e.g. Brief of California, et al., at p. 20; cf. Brief of St. Petersburg, at pp. 27-28, fn. 68). See *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

⁴*Ruckelshaus v. Monsanto Co.*, ____ U.S. ____, 104 S. Ct. 2862, 2880[8] (1984).

⁵*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁶In *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978), this Court observed that "[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated". In the ad hoc factual context of that case, that was a reasonable expression, because there the owner had already improved the entire site with a major building which concededly produced a reasonable

Second, although ignored by Petitioner and its amici, this Courts' precedents on the issue of remedies for uncompensated takings, beginning at least with *Hurley v. Kincaid*, 285 U.S. 95 (1932), and continuing through *Ruckelshaus v. Monsanto Co.*, *supra*, 104 S. Ct. at 2880 [8], decided only last term, make it crystal clear that just compensation is the preferred remedy because it tends to make the aggrieved citizen whole, while permitting the governmental entity to pursue "... the accomplishment of important governmental ends ..." (*Hurley v. Kincaid*, *supra*, 285 U.S. at 104, fn. 3).⁷ Moreover, 42 U.S.C. § 1983 provides for damages in case of regulatory land use takings: see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, *supra*.

Third, as astutely noted by Mr. Justice Brennan, non-monetary remedies tend to be ineffective, and provide enormous opportunities for governmental entities to drag their feet (or even to act in bad faith); see *San Diego Gas & Elec. Co. v. City of San Diego*, *supra*, 450 U.S. at 655, fn. 22)⁸.

Fourth, specific remedies require the courts to be telling regulatory entities *on an ongoing basis* how they may and may not regulate; *injunctive relief requires judicial oversight and*

return. But that hardly justifies the transplantation of the quoted metaphor into the context of the government simply taking a part of an unimproved tract of land, and in effect saying to its owner: "We don't have to pay, because we only took a part of your land, leaving you some residue". See *American Savings & Loan Assn. v. County of Marin*, 653 F. 2d 364 (1981 9th Cir.).

⁷For a concise summing up of *Hurley* and its progeny through 1974, see Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 Institute on Planning, Zoning and Eminent Domain, Southwestern Legal Foundation, at pp. 195-206. Since then the Court has adhered to this settled approach to remedies for takings in *Dames & Moore v. Regan*, 453 U.S. 654, 689, 691 (1981), and *Ruckelshaus v. Monsanto*, *supra*.

⁸The inefficacy of specific remedies was also noted by Richard F. Babcock, in his widely acclaimed book, "The Zoning Game," at p. 13. See footnote 23, *infra*.

continuing enforcement, thereby embroiling courts far more deeply in complex and varying land regulation schemes replete with overtly pursued local politics, than would the relatively simpler decision whether a particular regulatory scheme took a "stick" from the landowner's bundle of rights, thus requiring recompense. Moreover, there is a greater tendency to compromise monetary claims, whereas non-monetary ones provide incentives to defendants to litigate to the bitter end because it is cheaper (particularly where defense lawyers are salaried as municipal lawyers often are).

Fifth, as explicitly recognized by the Court in *Owen v. City of Independence*, 445 U.S. 622, 651 (1980), the imposition of compensatory damages not only effectively redresses the wrong (and indeed is the only way of doing so where economic injury has already occurred), but also provides a wholesome deterrent to future constitutional wrongdoing.

Sixth, the cries of fiscal doom emanating from some of Petitioner's amici (see e.g., Brief of New York City, *passim*), are little more than self-serving importunings that this Court make constitutional violations cheap and convenient. They are unworthy suggestions that the Court opt for chilling constitutional rights in preference to "chilling" (i.e., providing disincentives to) unlawful official conduct that is quite deliberately designed to constrict those constitutional rights to their absolute minimum and indeed beyond.⁹ This Court has repeatedly

⁹This is no hyperbole. Petitioner's amici demand for themselves "freedom" to experiment with "innovative" (read "confiscatory") land use restrictions. But the worst that the "innovators" want for themselves, should they infringe on the Constitution, is a judicial tut-tut of the "you shouldn't have done it" genre, followed by another go at the hapless owner (see e.g. Brief of California et al., p. 1, which importunes this Court to put the fox in charge of the chicken house). That is no more than the pursuit of the proverbial free lunch; see *San Diego Gas & Electric Co.*, *supra*, 450 U.S. at 652. Please bear in mind that in this very case the original developer went under by foreclosure. This is no fluke; California law alone is replete with cases in which owners lost their property by foreclosure while being "regulated" to death. See, e.g., *Jacobson v. Tahoe Regional Plan-*

rejected the odious notion that constitutional violations should be tolerated because that may be cheaper: *Watson v. Memphis*, 373 U.S. 526, 537 (1963), *United States Trust Co., v. New Jersey*, 431 U.S. 1, 28-29 (1977), *San Diego Gas & Electric Co. v. San Diego*, *supra*, 450 U.S. at 661 (Brennan, J. dissenting). More importantly, the ostensibly feared large judgments can threaten *only* if there have been large-scale, serious violations of constitutional rights. If so, all the more reason for this Court to provide disincentives to such conduct. As a noted commentator put it in another context, the "just compensation" guarantee does not extend only to cases where the taking is easy and cheap; indeed, the need for compensation is greatest where the loss is greatest. Stoebuck, *Condemnation of Rights The Condemnee Holds in Lands of Another*, 56 Iowa L. Rev. 293, 307 (1970).

Finally, clear recognition by this Court of limits on local regulatory powers that destroy private property rights, *and* the concurrent imposition of *effective* remedies making the victim whole and deterring future wrongdoing, will have the wholesome effect of balancing the social scales. After all, this isn't 1954; Rachel Carson's concerns for the environment are no longer a lone cry in the wilderness. In the ensuing quarter-century, environmentally inspired regulations have proliferated, and are now applied by a formidable array of powerful governmental bureaucracies armed to the teeth with far-reaching regulations imposed by a tough enforcement apparatus. The environmental movement has come of age, and like all other powerful forces in a free society must recognize its own limitations as well as responsibility to its victims. That is no more than a decent foundation on which a just society must ultimately rest. In

ning Agency, 566 F.2d 1353, 1366-1367 (1978, 9th Cir.); *Orsetti v. Fremont*, 80 Cal.App. 3d 961, 146 Cal.Rptr. 75 (1978); *Hollister Park Investment Co. v. Goleta County Water Dist.*, 82 Cal.App. 3d 290, 147 Cal.Rptr. 91 (1978); *Frisco Land & Mining Co. v. State*, 74 Cal.App. 2d 736, 141 Cal.Rptr. 820 (1977); *County of Los Angeles v. Berk*, 26 Cal.3d 201, 161 Cal.Rptr. 742, 605 P.2d 381 (1980); *Toso v. City of Santa Barbara*, 101 Cal.App. 3d 934, 162 Cal.Rptr. 210 (1980).

short, it is time to strike a balance between regulatory ends and constitutionally respectable means. A recognition that the victim of an overzealous regulatory process is entitled to recompense for demonstrable losses, will tend to accomplish just that.

ARGUMENT

I

PRELIMINARY STATEMENT: WHAT IS THE ISSUE BEFORE THE COURT?

While an amicus must perforce take the case as the parties have made it, there is nonetheless an unusual problem that presents itself at bench. Petitioner's briefing appears to be a candid effort to reargue the raw evidence favorable to itself, as if it were before a new trier of fact in the first instance (compare *Perkins v. Standard Oil Co.* 395 U.S. 642, 648 (1969), and *Gold v. National Sav. Bank, etc.*, 641 F.2d 430, 434 (1981), 6th Cir.)). The result of such unorthodox approach by Petitioner is to leave an amicus somewhat uncertain as to the precise issues Petitioner means to address.¹⁰

In spite of such difficulties, at the very least the following appears. The lower courts have applied Tennessee law (either correctly or in a manner acquiesced in by Petitioner) to hold that it was unlawful for Petitioner to prevent construction of Respondent's subdivision under the 1973 regulations, thereby preventing economically viable use of the affected land.¹¹

¹⁰I.e., Petitioner's first Question Presented (Pet. Br., p.i) disparages the lower courts' treatment of adjudicated facts, while the third Question Presented candidly quarrels with the lower courts' resolution of disputed evidence that led to the finding of estoppel, even though Petitioner has affirmatively acquiesced in the estoppel judgment by (a) not seeking appellate review thereof, and (b) by entering into an agreement (Pet. Br., Appendix, pp. 35-39) implementing that aspect of the District Court's decision and thereby rendering any argument on that issue moot.

¹¹As the opinion below makes clear (729 F. 2d at 403) there was substantial evidence that in 1973 the Planning Commission gave written approval for 736 units, but later reneged. Any dispute thereon

Thus, *the only legal issue properly raised* — as opposed to rearguing disputed facts adjudged against and acquiesced in by Petitioner — is what is the nature of the remedy to be granted Respondent for the years of unlawful denial by Petitioner of economically viable use of the Respondent's land. To put it another way, the question is one of remedies for the time Respondent was deprived of economically viable use of its property. Since such deprivation is now irretrievably in the past, it seems to amicus that this puts the case at bench into the "damages or nothing" posture (*Bivens v. Six Unknown etc. Agents*, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)) insofar as Petitioner's serious interim economic losses for the period of use deprivation are concerned.¹² To channel the court's efforts into any "invalidation" discourse now — as urged by Petitioner and its amici — would lead to an academic exercise in mootness: i.e., how does a court "invalidate" something which has already irreversibly occurred? How do losses already suffered "unhappen"?

was resolved by decisions of the trier of fact — both judge and jury — against Petitioner, *but Petitioner did not appeal therefrom*; on the contrary, Petitioner voluntarily entered into an agreement implementing that aspect of the case, thus giving rise to a situation closely analogous to *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977). The question of the lawfulness of Petitioner's conduct is thus at this time finally resolved against it, and disputations thereon barred by a judgment long since final, as well as mooted by Petitioner's voluntary implementation thereof (see Pet. Br., Appendix, pp. 35-39).

¹²The issue is hardly new. See *Gordon v. City of Warren*, 579 F. 2d 386 (1978 6th Cir.), *6th Camden Corp. v. Evesham Township*, 420 F. Supp. 709, 727-730 (D.N.J. 1976), recognizing the right to constitutionally-based damages for temporary deprivation of economically viable use of land, pending the owner's judicial establishment that the deprivation was unlawful under state law. Accord, *Keystone Associates v. State*, 333 N.Y.S. 2d 27 (App.Div. 1972), *aff'd*, 307 N.E. 2d 254 (N.Y. 1973).

II

THIS COURT'S HISTORY OF EXPLICIT RECOGNITION OF THE "JUST COMPENSATION" REMEDY FOR TAKINGS, AS AVAILABLE AND PREFERRED, IS LONGSTANDING AND THOROUGHLY SETTLED.

The supposed proposition pressed on the Court (that in cases of takings the "traditional" remedy is invalidation or enjoining of the confiscatory governmental conduct) is simply a myth which, like all mythology, derives its sustenance from a disregard of reality. The fact is that this Court has dealt with the issue of remedies for uncompensated takings over a half-dozen times, and those decisions opt for the monetary remedy of inverse condemnation, as primary. Petitioner and its amici have simply ignored all that decisional law,¹³ and, save for vigorous self-serving arguments, have not suggested any legitimate reason why this Court should suddenly depart from the sound and settled analysis outlined by Mr. Justice Brandeis in *Hurley v. Kincaid*, 285 U.S. 95 (1932), and followed ever since.

¹³An egregious example of such disregard is provided at pp. 6-7 of the amicus brief of California et al., where not only does Petitioner's friend ignore virtually all pertinent precedents of this Court, but it also has the temerity to charge Respondent with advancing "fiction". Of course, case law is to the contrary, and speaks for itself, belying in the process California's assertion that this Court has permitted the just compensation remedy only in cases of physical seizure, which is demonstrably not so; see *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Dames & Moore v. Regan*, 453 U.S. 654, 688-689 (1981); also see *United States Trust Co. v. New Jersey*, *supra*, 431 U.S. 29, fn. 27, and accompanying text. At times, the property right in question (e.g., a lien) is incapable of physical seizure, but it is protected by the "just compensation" clause just the same — *Armstrong v. United States*, 364 U.S. 49 (1960). The same is true of contractual rights: *Lynch v. United States*, 292 U.S. 571, 579 (1933).

It is difficult to see how this Court could have been clearer, when at the end of last term it unequivocally held in *Ruckelshaus v. Monsanto Co.*, *supra*, 104 S. Ct. at 2880 [8]:

“Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking” (citations and footnote omitted).¹⁴

Of course, *Ruckelshaus* was merely the most recent manifestation of a settled line of decisions going back at least to 1932: *Hurley v. Kincaid*, *supra*, 285 U.S. 96; *Dugan v. Rank*, 372 U.S. 609 (1963); *Fresno v. California*, 372 U.S. 627 (1963); *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974); *Dames & Moore v. Regan*, 453 U.S. 654, 688-689 (1981). Also see, *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 752-753 (1950) (held: state police power rendered property right unenforceable by injunction, but could not obviate constitutional obligation to pay just compensation for its actual extinguishment).

It is equally well settled that it is only in those rare cases where a government official attempts to act but, as it turns out, the act is wholly extralegal (i.e., the claimed power to act does not stem either from the Constitution directly, nor is it authorized

¹⁴A seemingly inconsistent assertion appears in footnote 12, in *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 166 (1958). However, the only authority cited there in support is *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, 343 U.S. 579, which, of course, dealt with a prospective, wholly extralegal seizure, rather than an already accomplished taking under otherwise proper powers. To the extent the terse footnote assertion in *Central Eureka* is inconsistent with the fully considered holding in *Ruckelshaus v. Monsanto Co.*, the former must undoubtedly be deemed overruled sub silentio by the latter. However, the two expressions need not necessarily be viewed as inconsistent, when the prospective vs. accomplished nature of the respective types of takings is kept in mind. Moreover, the *Central Eureka* footnote addresses “arbitrary governmental action” rather than a taking; the two, of course, may, but need not be the same.

by legislation) that injunctive relief becomes available to restrain a prospective taking. *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, 343 U.S. 579, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-691 (1949). Of course, where a taking (i.e., deprivation of the owner, not necessarily accretion of any formal interest to the taker — *United States v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945)) has actually occurred, it has been held from the outset that the government, as a creature of the Constitution, cannot even form the intent (much less act on it) to deprive an individual of property without just compensation. *Meigs v. McClung's Lessee*, 9 Cranch (US) 11, 18 (1815). Also, see *Armstrong v. United States*, 364 U.S. 40, 42 (1960) (held: Where government obtained benefit of property, it had to pay just compensation for deprivation of private liens therein irrespective of its “. . . intent or purpose . . .”).

To the above discussion one must add the teaching of *Ruckelshaus* that in inverse as well as direct taking cases the police power and taking power are coterminous (104 S. Ct. at 2879). That perforce means that when a regulatory governmental entity chooses to regulate within its general powers to promote police power objectives of public health, safety, welfare or morals, it thereby establishes a legitimate objective¹⁵ that is entitled to the same degree of judicial deference as the avowed pursuit of the eminent domain power for a public purpose; see *Hawaii Housing Authority v. Midkiff*, ____ U.S. ____, 104 S. Ct. 2321, 2329 (1984); *Ruckelshaus*, *supra*, 104 S. Ct. at 2879. Since the judicial role in “second-guessing the legislature” is held by these authorities to be extremely narrow, it follows that a regulatory taking effected by an overreaching statutory application is in every constitutional sense a taking for public use, for which compensation is mandated by the Fifth Amendment (binding on the states through the Due Process Clause of the Fourteenth Amendment — *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 15, 160 (1980)). Put another way, when regulators take the position that their regulation promotes the

¹⁵As opposed to wholly extralegal prospective acts as in *Youngstown Sheet and Tube Co.*, *supra*.

police power objectives, and as such is entitled to judicial deference for purposes of its validity, they cannot simultaneously assert when their regulation effects a temporary taking, then the regulation suddenly becomes so unimportant that the courts should disregard the teachings of *Midkiff* and *Ruckelshaus*, eschew all deference to the legislature, and as a matter of routine simply invalidate the regulation — as a first, not last, resort — merely to spare the regulators the need of obeying the weighty “just compensation” command of the Fifth Amendment. Such an argument is simply self-contradictory; it just won’t wash. “. . . [P]ower, once granted does not disappear like a magic gift when it is wrongfully used.” *Bivens v. Six Unknown etc. Agents*, *supra*, 403 U.S. at 392.

In sum, in spite of expansive assertions, Petitioner and friends are unable to put their finger on any holding of this Court that where a taking has already occurred, the “remedy” should be the ineffective and academic exercise of telling the wrongdoer through a court decree that it shouldn’t have done what it already did, leaving the victim uncompensated for serious economic losses already inflicted. Petitioner and friends are unable to do so because no such unjust cases are extant; as shown above, this Court has historically opted for effective compensatory remedies as part of its remedial arsenal, and has done so consistently in physical as well as non-physical takings (see footnote 13, *supra*). No legitimate reason appears why that reasoned and mature doctrinal approach to the taking problem should be suddenly abandoned now.

III

THE ACTS OF PETITIONER WERE WITHIN ITS POWERS, EVEN IF THE MANNER OF EXECUTION EXCEEDED CONSTITUTIONAL LIMITS.

Two points need to be touched on briefly in connection with the law of remedies discussed above.

First, *Ruckelshaus*, *supra*, speaks of takings of property “. . . duly authorized by law . . .” Does that mean that there

must be express authorization of the taking qua taking?¹⁶

The short answer to this question was provided by this Court in *Davis v. Newton Coal Co.*, 267 U.S. 292, 301 (1925): “The incantation pronounced at the time [of taking] is not of controlling importance; our primary concern is with the accomplishment.”¹⁷ Likewise, *Hughes v. Washington*, 389 U.S. 290, 298 (1967): “. . . The Constitution measures a taking of property not by what a State says, or what it intends, but by

¹⁶This issue bears comment in light of the ingenious assertion in the Brief of the United States, that when government action is “not authorized”, no “taking” can result. The vintage case of *Hooe v. United States*, 218 U.S. 322 (1910) relied on by the Solicitor General is simply not on point because there the Congress expressly refused to appropriate a \$6,000 annual rent, whereupon the claimant rented the premises to the government for \$4,500 (which he accepted) and sued on the balance. What that has to do with the ad hoc factual analysis required at bench (*Kaiser Aetna v. United States*, 444 U.S. 164, 174-175 (1979)) is obscure. With respect, the Solicitor General seems to confuse those cases where the action is wholly extralegal and hence the officials are without any power to act at all (e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, *supra*, 343 U.S. 579), and those cases where the power to act exists, but the illegality springs from failure to authorize payment of just compensation (*Hurley v. Kincaid*, *supra*, *Ruckelshaus v. Monsanto Co.*, *supra*), thereby triggering a constitutional remedy (*Jacobs v. United States*, 290 U.S. 13, 16 (1933)).

¹⁷Another answer is provided by the fact that the Tucker Act provides a procedure for recovering compensation from the government for claims arising under the Constitution. *Jacobs v. United States*, *supra*, 290 U.S. at 16. But if it were first necessary to show that the governmental act was “authorized” (in the sense of the taking being authorized rather than the governmental act that led to the taking) that would make self-stultifying nonsense out of the Tucker Act, for then a claim under the Constitution would be of no avail, and the claimant would be limited to claims under statutes “authorizing” the taking. Compare *United States v. Dickinson*, 331 U.S. 745, 748-749 (1947). Put another way, if the taking itself first had to be authorized by legislation, there could never be an inverse condemnation case. Yet, this Court’s many precedents and the daily business of the U.S. Claims Court bear striking witness to the contrary.

what it *does* (Stewart, J. concurring, emphasis in the original.) See, *San Diego Gas & Electric Co.*, *supra*, 450 U.S. at 652-653. Thus, in *United States v. Lynah*, 188 U.S. 445 (1903), the "authorized" governmental act was the construction of a dam, not appropriation of the plaintiffs' land. And in *United States v. Causby*, 328 U.S. 256 (1946), the "authorized" act was the flight of aircraft through navigable airspace, not an appropriation of a flight easement. Yet both were deemed compensable takings because that was required by the Fifth Amendment. Or, as this Court put it in *Hurley v. Kincaid*, *supra*, 285 U.S. at 104:

"For even if the defendants are acting illegally, under the Act, in threatening to proceed without first acquiring flowage rights over the complainant's land, the illegality, on complainant's own contention, is confined to the failure to compensate him for the taking, and affords no basis for an injunction if such compensation may be procured in an action at law" (footnote omitted).

In sum, the illegality of governmental conduct at bench, as in *Hurley*, did not consist of any absence of authority to act¹⁸, but rather of acting in pursuance of such authority in an excessive way that deprived Respondent of any economically viable use of its land for the duration of the illegal conduct.

A second aspect of *Ruckelshaus* (and kindred cases) that warrants mention, is the Court's familiar inquiry into the availability of the Tucker Act remedy, which finds no application in cases such as this, where the taking arises by conduct of state rather than federal entities. All the Tucker Act does is waive the United States' defense of sovereign immunity, and designates a special court for monetary claims in excess of \$10,000. The

¹⁸Quite the contrary. Petitioner vigorously asserts lawful possession of the police power to regulate subdivisions, which is not disputed. The controversy is over the way in which Petitioner wielded its plainly and concededly present authority. In other words, Petitioner's authority was not lacking; rather, it went "too far" (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

Tucker Act in no way gives rise to a cause of action;¹⁹ it is "... only a jurisdictional statute; it does not create any substantive right..." "... it merely confers jurisdiction upon [the Claims Court] whenever the substantive right exists..."", *United States v. Mitchell*, 445 U.S. 535, 538-539 (1980). Accord, *United States v. Testam*, 424 U.S. 392, 398 (1976).

None of these concerns, however, have any applicability to lawsuits in federal courts against state and local defendants, for there jurisdiction is provided by 28 U.S.C. §1331 and 28 U.S.C. §1343, and the substantive right of recovery at law by the Constitution and 42 U.S.C. §1983. Indeed, it has long been settled that federal courts do have jurisdiction to entertain on the merits claims of takings by local entities. *Cuyahoga River Power Co. v. Akron*, 240 U.S. 462 (1916), *Mosher v. Phoenix*, 287 U.S. 29 (1932).

IV

PRESERVATION OF THE RIGHT TO JUST COMPENSATION FOR TEMPORARY TAKINGS AS PART OF A FLEXIBLE AND FAIR SYSTEM OF REMEDIES RESTS ON SOUND POLICY, SETTLED PRECEDENT, AND CONSERVATION OF JUDICIAL RESOURCES.

Any argument on the issue of remedies must at least begin with this Court's definitive analysis in *Hurley v. Kincaid*, *supra*, 285 U.S. 95, which is conceptually dispositive. When a taking is effected in pursuance of governmental powers — as is the case at bench — the property owner's grievance arises not

¹⁹Indeed, neither does it give rise per se to any particular remedy. What the Tucker Act does, is provide the jurisdictional and procedural means of pursuing a constitutionally mandated monetary remedy for a pre-existing substantive, constitutional "cause of action"; i.e., a completed taking of a property interest. *Jacobs v. United States*, *supra*, 290 U.S. at 16. Where such monetary remedy at law is adequate, this forecloses equitable relief (*Hurley*, 285 U.S. at 104; *Ruckelshaus*, 104 S. Ct. at 2880 [8]). For further discussion of the Court's analysis of the law of remedies, see *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949).

because of the taking,²⁰ but because compensation has not been paid (285 U.S. at 104). It follows, therefore, that if compensation is provided by the courts (whether at the government's or the owner's behest) the illegality is eliminated (Id.). Moreover, it is the courts that have primacy in determining just compensation; see, e.g. *United States v. New River Collieries*, 262 U.S. 341, 343 (1923); *Seaboard Air Line Ry. v. United States*, 261 U.S. 299, 304 (1923).

Nor did *Hurley* stop there; it went on to admonish:

"Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon a clear showing that its intervention is necessary to prevent an irreparable injury." 285 U.S. at 104, fn. 3.

That admonition, of course, puts its finger on the pertinent policy: it would be most improvident to structure a constitutional imperative striking down potentially vital regulations, as the sole remedy, merely because they impacted on a property owner so as to deprive him of a "stick" in his property rights "bundle". The *Regional Rail Reorganization Act Cases*, *supra*, provide an excellent example of the hazards inherent in Petitioner's theory. Had such a theory been applied there (as indeed it was by the trial court, only to be rejected by this Court) the upshot would have been an instant destruction by the stroke of a judicial pen of a comprehensive congressional scheme, that would have left the most densely populated regions of the country without an effective rail transportation system, with eight major railroads in the throes of fragmented, individual bankruptcy proceedings, without a coherent system whereby to

²⁰This is so because the taking power is an inherent attribute of sovereignty (*Kohl v. United States*, 1 Otto (U.S.) 367 (1876)); the Constitution only limits it, inter alia, by requiring that just compensation be paid. *Miss. & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

consolidate and make optimally useful all of their combined resources, still needed to maintain a national rail transportation system. The same is true of *Dames & Moore v. Regan*, *supra*. Had Petitioner's no-compensation approach been applied there, the result would have been a drastic disruption of the executive power to conduct foreign relations, with severe consequences to the affected citizens. Instead, the Court's opting for availability of the compensation remedy preserved both the governmental policies, and the rights of the few adversely affected individuals. While the instant controversy does not present the Court with such far-reaching prospects as the above cases, it still should not serve as a vehicle for the formulation of a dogmatic constitutional imperative that in future applications would compel judicial destruction of regulatory schemes that some day may be vital to national survival.²¹

As Mr. Chief Justice Marshall enduringly put it:

"The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. *This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end.* This provision is made in a constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v.*

²¹This is no hyperbole. Surely, it takes no vivid imagination to visualize governmental responses to the difficult problems of energy, deficit control, and inflation, for example, that may trench on constitutionally protected property rights of some individuals. Should that occur, which would be better public policy: to require the benefited public to pay only for those limited private rights destroyed in the process of thus bettering the public condition (see *San Diego Gas & Electric Co.*, 450 U.S. at 652), or to declare such programs completely invalid, with possibly calamitous consequences? (*Hurley*, 285 U.S. at 104, fn. 3).

Maryland, 4 Wheat. 316, 415 (1819), emphasis added.

Petitioner's thesis, that would have the courts invalidate legislative enactments on an ongoing basis, as the primary remedy, violates that principle, and ignores the gravity of judicial intervention in the workings of a tri-partite democratic government. When the judiciary invalidates a legislative enactment it is a measure of last — not first — resort. The judicial power to invalidate is historically rooted in "strict necessity" (*Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947); *Spector Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944)), and is to be invoked only when "unavoidable" (*Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 136 (1946)). See *Rescue Army v. Municipal Court*, *supra*, 331 U.S. at 571-572.

Petitioner's theory seems preoccupied with short-range provincial concerns of local governmental interests. It ignores the grave strain that judicial invalidation of legislation imposes on the fabric of a democratic society. It improvidently demands a rule that would have the judiciary tell the legislature what it may or may not enact, not in the historical context of major policy conflicts that have confronted the nation on occasion and thereby made legitimate claims on this Court's extraordinary power to invoke the organic law's grand scheme of checks and balances, but in terms of routine, day-in, day-out, case by case, ad hoc adjudications of purely local (usually intensely political) decisions involving what in national policy terms are but insignificant patches of land. Petitioner's approach would make the judiciary an ongoing supervisor of the local legislative branch; it would make this Court the Supreme Board of Zoning Appeals.

The foregoing is no hyperbole. Only a few state's law provides so-called site specific non-monetary relief;²² i.e., judicial relief in the form of a decree that commands the regulating entity to allow a specified improvement on the

²²See e.g. *Sinclair Pipeline Co. v. Village of Richton Park*, 167 N.E. 2d 406, 411 (1960, Ill.).

specific site. The vast majority of jurisdictions (in those cases where non-monetary relief is granted) merely remand the matter back to the regulatory entity for further action, thus inviting ongoing judicial involvement. Aside from the delay-laden inefficiency of such a procedure, it also opens up vast opportunities for either regulatory foot-dragging or outright bad faith, as acutely noted by Mr. Justice Brennan in *San Diego Gas & Electric Co. v. City of San Diego*, *supra*, 450 U.S. at 655, fn. 22.²³

²³It must be noted with great emphasis that the problem is far more pervasive than one might surmise from the entirely accurate, if somewhat flippant, remarks of a California city attorney quoted there. No less an expert than Richard F. Babcock, the dean of the land use bar, noted the severity of the problem in his book, "The Zoning Game" (Univ. Wisc. Press, 1966) at pp. 12-13, with devastating accuracy: "First, we have the multiplicity of jurisdictions, the innumerable decision-makers. In other significant areas of administrative law — the regulation of utilities, control over the issuance of securities, and the arbitration of disputes between employer and employee — there exist if not national at least statewide forums for the resolution of disputes. In the area of zoning there is no such centralized umpire to provide a sense of belonging to a common administrative practice, and, indeed, of sharing a common administrative ethic. Among these scattered groups of lay decision-makers there is an almost total lack of communication despite the efforts of innumerable planning groups, each offering earnest if generally diffused guidance. One of the most significant results of this fractured decision-making process is that the injunctions of the judiciary have only nominal impact upon the decision-makers. If the Supreme Court of California makes a determination that the California Public Utilities Commission has acted improperly, the impact of that judicial determination is direct and, in most instances, decisive. But if the Supreme Court of California were to say to the local legislature in Community X that its policy is improper that injunction, I suspect, would have little practical impact upon the identical administrative actions of Community Y or perhaps even on Community X itself. Other lawyers have shared the experience that follows a victory on behalf of a landowner in the state Supreme Court. You have obtained a decision that the single-family classification of your client's property is unreasonable. Your client wants to use the property for commercial purposes. The community immediately rezones the property to a Duplex Zone and invites you to spend

Moreover, putting aside such potential for unwholesome governmental conduct, injunctive relief is often ineffective without judicial oversight. In practice, in order to have effective specific decree enforcement, one would have to embroil the courts even deeper in the ongoing administration of complex local land use schemes, and impinge further on the courts' limited resources. In contrast, in appropriate cases where a compensable economic loss has already been suffered, a court need only order recompense under the familiar rules of eminent domain valuation (*San Diego Gas & Electric Co.*, 450 U.S. at 658-659), thereby concluding the particular litigation, and freeing itself for other judicial business.

V

MR. JUSTICE BRENNAN'S VIEWS IN SAN DIEGO GAS & ELECTRIC CO. HAVE BEEN WIDELY ACCLAIMED, AND FORM A DESIRABLE BLUEPRINT FOR SOLUTION OF THE ISSUE BEFORE THE COURT

There is little that can be added to the above heading. The response of the Courts of Appeals speaks for itself. So far, the following Circuits have expressly opted to follow the views articulated in the Brennan opinion: ²⁴ *Hernandez v. City of*

another two years and thousands of dollars litigating *that* classification.

"This indifference to judicial decisions applies, by the way, even in jurisdictions such as Maryland, where, as in Baltimore County, there are relatively few independent municipalities and decisions with respect to land use are centralized in the county itself." Emphasis added.

Of course, since the time Mr. Babcock wrote, things have changed a bit, and a second round of litigation these days can easily consume a multiple of the "two years" he alludes to, to say nothing of tens of thousands of dollars, and likely more.

²⁴Reasoning quite logically that since Mr. Justice Brennan spoke for four members of the Court, and Mr. Justice Rehnquist — although joining the majority on the jurisdictional point — was unmistakably clear in his endorsement of the substantive soundness of Mr. Justice

Lafayette, 643 F. 2d 1188 (1981, 5th Cir.), *Devines v. Maier*, 665 F. 2d 138, 142, (1981, 7th Cir.), *Barbian v. Panagis*, 694 F. 2d 476, 482, fn. 5 (1982, 7th Cir.), *In re Aircrash in Bali*, 684 F. 2d 1301, 1311, fn. 7 (1982, 9th Cir.), *Martino v. Santa Clara Valley Water Dist.*, 703 F. 2d 1141, 1148 (1983, 9th Cir.), *Fountain v. Metro Atlanta Rapid Transit Dist.*, 678 F. 2d 1038, 1043 (1982, 11th Cir.) and of course, the Court below: *Hamilton Bank v. Williamson County, etc., Comm'n.*, 729 F. 2d 402, 408 (1984, 6th Cir.). To the same effect, *Wheeler v. City of Pleasant Grove*, 664 F. 2d 99 (1981, 5th Cir.), endorsing the 42 U.S.C. §1983 damages remedy for temporary denial of use of the subject property under a local confiscatory land use ordinance. Also see, *Gordon v. City of Warren*, 579 F. 2d 386 (1978, 6th Cir.). Only the First Circuit adheres to the lonely and concededly problem-ridden position that non-monetary relief is the sole remedy: *Pamel Corp. v. Puerto Rico Highway Auth.*, 621 F. 2d 33 (1980, 1st Cir.)²⁵

Similarly, in the short time since their articulation, the *San Diego Gas & Electric Co.* substantive views have commanded a following among state courts; see e.g., *Burrows v. City of Keene*, 432 A. 2d 15, (1981, N.H.); *Zinn v. State*, 334 N.W. 2d 67, 72-73 (1983, Wis.); *Rippley v. City of Lincoln*, 330

Brennan's views (450 U.S. at 633), the Brennan views clearly intimated the substantive and remedial views of the Court's majority, particularly since the majority opinion in *San Diego* merely addressed jurisdiction — it did not disagree with the dissent's substantive views.

²⁵It bears noting that *Pamel* was decided without benefit of *San Diego Gas & Electric Co.*, and the views expressed there are pure dictum, the holding being that the plaintiff failed to allege any causal connection between the defendant and the assertedly wrongful act (see 621 F. 2d at 36 [4]). In *Citadel Corp. v. Puerto Rico Highway Auth.*, 695 F.2d 31, 33-34, fn. 4 (1982, 1st Cir.), the First Circuit candidly expressed doubt about the soundness of its *Pamel* views in light of *San Diego*, but avoided its problem by resting the decision on Eleventh Amendment grounds, the defendant in *Citadel* being the Commonwealth of Puerto Rico.

N.W. 2d 505, 511 (1983, N.D.);²⁶ also see *Pioneer Land & Gravel v. Anchorage*, 627 P. 2d 651 (1981, Alaska) (Reserving judgment on proper remedy in light of *San Diego Gas &*

²⁶In light of *Ripley's* agreement with Justice Brennan's opinion ("... constitutes not only a legally correct analysis of the 'taking' involved but also provides a practical and fair solution for all parties," 330 N.W. 2d at 511 [5]) one is shocked to come across the amicus brief of California asserting (at p. 6, fn. 2) that North Dakota, among other states, denies the right to compensation (compare also *Kraft v. Malone*, 313 N.W. 2d 758 (1981, N.D.)), and therein lies a bit of a tale. Space limitations prevent a full analysis of California's glob of sometimes dated string citations contained there. But it must be noted that several other states cited there have modified their positions and now allow inverse condemnation recovery in proper cases; they are Colorado (*Hermanson v. Board of Commissioners*, 595 P.2d 694 (1979 Colo. App.)), Oregon (*Seuss Builders v. Beaverton*, 656 P.2d 306 (1983, Ore.)), and Florida (*Askew v. Gables-by-the-Sea*, 333 So. 2d 56 (1976, Fla. App.), *Key Haven Associates v. Board of Trustees, etc.*, 427 So. 2d 153 (1983, Fla.)).

In short, by its selective briefing, California is no friend of the court's taxed resources, and unfortunately the same is true of the collection of commentaries at p. 10, fn. 5, of its brief. The literature is indeed vast, but hardly as one-sidedly doctrinaire in its views as one might surmise by reviewing California's hand-picked examples. For a sampling of different views of commentators, see Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L. Jour. 15 (1983), McMurry, *Just Compensation or Just Invalidity: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. Rev. 711 (1982), Berger, *To Regulate or Not to Regulate — Is That the Question? Reflections of the Supposed Dilemma Between Environmental Protection and Private Property Rights*, 8 Loyola (L.A.) L. Rev. 253 (1975); Badler, *Municipal Zoning Liability in Damages — A New Cause of Action*, 5 Urban Law. 25 (1973). Note also that one of the polemical commentaries (by Prof. Girard) cited by California, was the subject of a devastating refutation by another commentator — see Berger, *The State's Police Power Is Not (Yet) the Power of a Police State: A Reply to Professor Girard*, 35 Land Use Law & Zoning Digest 4 (May 1983).

Electric, but in the meantime allowing the inverse condemnation action to proceed).

Apart from the above decisions expressly animated by the fairness and pragmatism of the *San Diego Gas & Electric Co.* dissent, other states have independently decided to endorse the efficacy of the inverse condemnation "just compensation" remedy. Putting aside the invalidation-only jurisdictions fulsomely briefed by Petitioner and friends, these states may be grouped as follows:

(a) states which relegate the aggrieved land owner solely to monetary remedies: *Village of Willoughby Hills v. Corrigan*, 278 N.E. 2d 658 (Ohio 1972), cert. den. sub nom. *Chrongris v. Corrigan*, 409 U.S. 919 (1972), Douglas, J., dissenting (opinion); *Clifton v. Berry*, 259 S.E. 2d 35 (Ga. 1979); *Milardo v. Coastal Resources Management Council*, 434 A. 2d 266 (1982, R.I.); *Hamilton v. Conservation Comm'n.*, 425 N.E. 2d 358 (1981, Mass. App.) (dictum).

(b) states which allow both specific relief and damages for demonstrable losses: *City of Austin v. Teague*, 570 S.W. 389 (1978, Tex.); *Ventures in Property I v. City of Wichita*, 594 P. 2d 671 (1979, Kan.); *Brazil v. City of Auburn*, 598 P. 2d 1 (1979, Wash. App.); Also see, *Sheer v. Township of Evesham*, 445 A. 2d 46 (1982, N.J. Super); *Key Haven Associates v. Board of Trustees, etc.*, 427 So. 2d 153 (1983, Fla.).

(c) states which express a preference for specific relief, but allow damages where such relief would be ineffective: e.g., *Hermanson v. Board of Commissioners*, 595 P.2d 694 (1979, Colo. App.), *Eck v. City of Bismarck*, 283 N.W. 2d 193 (1979 N.D.).

(d) New York is in a category by itself. It purports to hold that invalidation is the only remedy, unless there has been physical invasion or direct legal control of the affected property, or where the injury

suffered is irreversible, *Fred F. French Investing Co. v. City of New York*, 350 N.E. 2d 381 (1976 N.Y.). Yet, New York has steadfastly refused to compensate even for physical invasion (see, *New York Telephone Co. v. North Hempstead*, 363 N.E. 2d 694 (1977 N.Y.); *Loretto v. Teleprompter Manhattan CATV*, 423 N.E. 2d 320 (1982 N.Y.), reversed, 458 U.S. 419 (1982), or irreversible injury (see, *Charles v. Diamond*, 360 N.E. 2d 1295 (1977 N.Y.). At the same time, New York has routinely awarded damages for temporary de facto taking effected by use-stultifying regulation in *Keystone Associates v. State*, 371 N.Y.S. 2d 814 (Ct. Cl. 1975), rev'd. 389 N.Y.S. 2d 895 (App.Div. 1976), rev'd. and remanded, 383 N.E. 2d 560 (1978).

In sum, it appears that of the jurisdictions which have considered the issue of taking remedies *recently*, most opt for recognition of damages as a flexible and pragmatic component of a just and fair remedial scheme. Specific relief often remains available, but only as one component of a comprehensive remedial scheme, which is as it should be, for only a combination of these approaches can assure substantial justice to both sides in most cases.

This developing picture is in large measure due to the persuasive influence of Mr. Justice Brennan's views in *San Diego Gas & Electric Co.*, which are noteworthy because they posed no precedential compulsion. Yet, those views have been so often adopted because they are plainly right. Under that approach the rights of all parties are protected:

- (a) The regulatory entity need not fear that its important policies will be frustrated against its will.
- (b) The regulatory entity gets to opt for acquisition of an appropriate property right in the regulated land, or for retreat from its overly ambitious regulatory scheme.

(c) The landowner is assured of ability to proceed with *some* reasonable, economically viable use of his property, and is recompensed to the extent of demonstrable losses suffered.

(d) Even in the "worst case scenario" (from the regulatory entity's point of view), in those few cases where the entity's invasion of private rights is so egregious that it may be adjudged to acquire the stigmatized property (rather than merely pay for a limited/temporary interest therein), it gets in exchange for its money a valuable asset at its judicially determined fair value. The entity thereby loses little; it merely converts one asset into another. And if that should prove too burdensome, the entity has its relief in its own hands: it can then resell the thus acquired land and recoup its involuntary investment.²⁷

In sum, the *San Diego Gas & Electric Co.* analysis is sound and fair, and has been remarkably persuasive to courts around the country in spite of its lack of precedentially compulsive effect. It is time to adopt it as the Court's holding.

CONCLUSION

"After all, if a policeman must know the Constitution, then why not a planner?"

Brennan, J.,
450 U.S. 661, fn. 26

In the final analysis, that question cuts to the heart of the matter. After all the polemics are done with, there remain but

²⁷The experience of the City of Palo Alto is instructive. In *Arastra Limited Partnership v. City of Palo Alto*, 401 F. Supp. 962 (1975 N.D. Cal.) the City was held liable, whereupon it settled (see 417 F. Supp. 1125) by acquiring the land in question for some seven million dollars. Later, land values rose sharply, and the tract in question is now reputed to be worth over twenty million dollars; the city is said to have explored selling the land to a developer at a huge profit.

few unyielding legal and factual realities at bench. *First*, the Constitution addresses takings, not merely *some* takings; it commands payment of "just compensation" — not inadequate compensation, and *a fortiori* not no compensation. *Second*, this court's settled precedential record is plain in its recognition of availability of just compensation as the remedy in uncompensated taking cases, because it is effective, pragmatic, and in the long run better serves the greater public interest, irrespective of the mechanics of the taking. *Third*, the *only* reason why this newly-resurrected remedies issue is being thrust on the Court at this late date, is the simple fact that planners and land use regulators demand for themselves a special privilege: a rule that would impose on them a lesser remedial responsibility to their victims than is faced by other constitutionally transgressing entities and officials. (See Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, *supra*, 15 Rutgers L. Jour. at 99). No respectable reason has been advanced for such an unblushing demand that the Court create some sort of aristocracy, as it were, privileged to live above prevailing norms of constitutional accountability. Justice Brennan's policeman, reacting instantly to deadly peril, all alone in a dark alley, often with limited education and experience, still must know *and obey* the Constitution — and be accountable for his refusal to do so. No respectable reason appears why the municipal land use establishment, replete with planners, legal counsel and expert consultants, fully advised of its responsibilities, and acting at leisure (usually, as at bench, taking years to accomplish its purpose) should claim for itself a lesser standard of constitutional accountability.

As the court noted in *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926), in a changing world, the scope of constitutional guarantees must "expand and contract to meet the new and different conditions which are constantly coming within the field of operations." In the past half-century, their scope has contracted in the face of expanding (nay, exploding) land use regulations. But now the time is at hand to note that the sword and scales of justice have two sides. In the face of expansive

growth of land regulatory powers, it is time to reaffirm the line beyond which constitutional rights may not be impaired with impunity. "In a changing world, it is impossible that it should be otherwise" (*Euclid, supra*). *A fortiori* so, in a principled if changing world.

Land use regulations have at long last reached such a level of intensity and complexity that they often become counter-productive. Instead of regulating housing, they frustrate it; instead of solving problems, they exacerbate them. That is not in the public interest. It does not deserve the issuance of what amounts to a carte blanche. If permitted to go on unchecked and unrestrained by an obligation to make whole its victims, it is a process that is certain in the long run to erode property rights and impair other liberties; see *Pennsylvania Coal Co. v. Mahon, supra*, 260 U.S. at 415.

For ultimately, there can be no real liberty for people whose property rights can be snuffed out by an irresponsible government; liberty and property are in the final analysis interdependent and "neither could have meaning without the other" (*Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972)).

Amicus respectfully urges that the decision of the Court of Appeals be affirmed.

Respectfully submitted,
GIDEON KANNER
Attorney for Amicus Curiae
California Building Industries
Assoc.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 12, 1984, I served the within *Brief of Amicus Curiae* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 12, 1984, at Los Angeles, California.

Robin J. McColgan
(*Original signed*)

No. 84-4

Office - Supreme Court, U.S.

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DEC 13 1984

IN THE

ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *et al.*,
Petitioners,

vs.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**BRIEF AMICUS CURIAE OF
THE NATIONAL APARTMENT ASSOCIATION
IN SUPPORT OF RESPONDENTS**

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No. 84-4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *et al.*,
Petitioners,

vs.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

**BRIEF AMICUS CURIAE OF
THE NATIONAL APARTMENT ASSOCIATION
IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36.2, the National Apartment Association respectfully submits this brief amicus curiae in support of respondent, Hamilton Bank. Consent to the filing of the brief has been granted by counsel for all parties. Copies of these letters of consent have been lodged with the clerk of this Court.

Amicus Curiae National Apartment Association is a nonprofit association which, together with its state and local affiliates, represents the interests of all owners, developers and operators of residential rental properties who provide shelter for more than 30 million households in this country. The industry represented herein by amicus curiae, vital as it is to the health and welfare of more than one-third of the national population, is increasingly threatened by overreaching regulators of land uses who, undeterred by the prospect of mere injunctive relief against their constitutional transgressions, persist in creative and repetitive land use restrictions with callous disregard for constitutional limitations. The economic vitality of this industry, which requires substantial and complex long-term planning and immense long-term financial commitment, is threatened by repeated and capricious regulatory acts, thereby impairing the Nation's housing supply. The National Apartment Association appears herein as amicus curiae to beseech this Court to uphold the vitality of the compensatory and deterrent purpose of the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The real issue in this case was decided in 1215 on the plain called Runnymede: "No constable or other bailiff of ours shall take the corn or other chattels of any one except he straightway give money for them" Magna Carta (Henderson translation). Somewhat less direct language in the Magna Carta similarly guaranteed landholdings to be free from confiscation by the Crown. What difference to the owner whether his property be seized or he be deprived of its beneficial use?

The battle to vindicate the rights of persons to acquire and be secure in their property was fought and won again—in 1776 on the fields of Bunker Hill, Lexington, and Concord, and in 1789 in the legislative chambers in Philadelphia. Concerned over the possible confiscatory tendencies of the democracy then

in creation,¹ our Founding Fathers created personal rights in a Bill of Rights addressed, among other things, to the protection of private property:

No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation. [U.S. Constitution, Amendment V.]

Although petitioners and their supporters contend that the Just Compensation Clause is applicable only to affirmative actions in eminent domain, this Court has repeatedly upheld claims for compensation for government action which was not designed to acquire title but which nonetheless destroyed the owner's economically viable use by "occupying" or "physically invading" the property. Further, although not until now presented with an unobstructed opportunity to sustain an order of compensation therefor, this Court has repeatedly stated that a regulation which similarly prevents economically viable use of property can also amount to a "taking." In this case a properly instructed jury upon substantial evidence has found that the

¹ The awareness of the constitutional draftsmen of the threat which majoritarian power posed to property rights is reflected in the writings of James Madison:

Complaints are everywhere heard . . . that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties; and that measures are too often decided, *not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority.* . . .

Factions develop whereby a number of citizens, whether amounting to a majority or minority of the whole . . . are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.

. . .

When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good and the rights of other citizens. . . .

. . .

In a pure democracy a common passion or interest will, in almost every case, be felt by a majority of the whole; . . . there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . . [The Federalist, No. 10, at 104-09 (J. Madison) (Hamilton ed. 1868) (emphasis added).]

petitioners' regulatory actions denied respondent any economically viable use of its land and thus constituted a compensable taking. Petitioners' attempt to dispute these factual determinations must be disregarded pursuant to well-established standards of appellate review.

Petitioners and their supporters also contend that even if a regulatory action exceeds constitutional limits and denies all viable use of the affected property, there is no entitlement to compensation for the injury occasioned thereby, and that an owner is left only with the hollow remedy of judicial invalidation. In this view, the Just Compensation Clause is relegated the role of being merely a discretionary option in favor of the government, and not a *right* of the aggrieved landowner. Amicus Curiae National Apartment Association respectfully suggests that the proponents of this view are plainly in error. If property has been "taken," the Fifth Amendment *commands* compensation. The word "maybe" appears nowhere therein, nor does that Amendment contemplate the incredible proposition that constitutionally excessive governmental action absolves the body politic from the compensatory obligation it would have incurred had it taken the property lawfully by eminent domain.

Nor is it persuasive to argue that government cannot function if required to compensate those injured by its careless or willful deprivation of the personal right to own and enjoy private property. This Court has held that the Fourth Amendment provides by implication for compensation for governmental denial of the rights stated therein, yet the processes of law enforcement have continued apace thereafter, although perhaps more lawfully. The abolition of sovereign tort immunity has not yet emptied the public treasury, and government goes on, although perhaps with a new and rightful concern for the safety of others. It is urged herein that the vindication of the compensation rights of those whose property is "taken" by overreaching regulators will not mean the end of regulation for the public weal, but merely the exercise of a more cautious view toward the most extreme and confiscatory options placed before the regulators. As this concept has been so succinctly and aptly described by Mr. Justice Brennan, "After all, if a police-

man must know the Constitution, then why not a planner?" *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 661 n. 26 (1981) (Brennan, J., dissenting).

It is respectfully submitted that the regulatory restraint in the instant case, which has been found by the jury to have deprived respondent of all economically viable use of its land, constitutes a taking which, as the United States Court of Appeals for the Sixth Circuit correctly decided, requires payment of just compensation.

Amicus Curiae National Apartment Association does not address herein several interesting but subordinate issues raised in this case so that the cardinal question of national importance—the compensatory nature of a regulatory "taking"—may receive the emphasis it properly deserves.

ARGUMENT

I

REGULATION WHICH GOES "TOO FAR" CONSTITUTES A "TAKING" OF PRIVATE PROPERTY

At issue in this case is whether the express language of the Fifth Amendment is to be given its clear meaning and effect. That Amendment provides, in pertinent part:

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.²

The Fifth Amendment's dual prohibitions against the deprivation of property without "due process" and the taking of property without "just compensation" are not mutually exclusive concepts. Rather, they are cumulative and complementary to one another, each stating a distinct protection for the rights of property owners. Implicitly acknowledging that under some circumstances government may deprive a person of

² The Just Compensation Clause was the first provision of the Bill of Rights extended to the states and their subdivisions under the Fourteenth Amendment. *Chicago B & Q v. Chicago*, 166 U.S. 266 (1897).

life, liberty, or property, the Constitution requires that this be done only in accordance with due process. Even where due process permits the deprivation, the Constitution requires there be "just compensation" for the taking of property.

In 1922 this Court declared that a regulatory restriction on land use, although not an outright exercise of the eminent domain power, nor a physical invasion or occupancy of property, nonetheless constituted an impermissible taking. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Mr. Justice Holmes wrote for the majority of the court that:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. [260 U.S. at 415.]

In an observation which is certainly even more cogent in the land-use regulation realities of the 1980's than in those of the 1920's, Mr. Justice Holmes stated:

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U.S. 598, 605. *When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.* [260 U.S. at 415 (emphasis added).]

The compensation issue never arose in *Pennsylvania Coal* for the simple reason that the government was not a party to that action.

In at least eight decisions between *Pennsylvania Coal* and *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981), this Court has held or strongly intimated that governmental interference with private property may amount to a taking without physical occupancy or invasion thereof. In *United States v. General Motors Corp.*, 323 U.S. 373, 378

(1945), this Court stated that whether property is "taken" is determined by reference to the effective deprivation suffered by the owner thereof rather than the value of what right or interest is obtained by the government, even where the governmental action does not amount to occupancy or acquisition of title.

In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court awarded compensatory damages to a plaintiff whose materialman's liens against a shipbuilder were nullified when the United States took title to the debtor's property: the government had not occupied, physically invaded, or taken title to the liens, but had destroyed their value by its action. The Court rejected the asserted dichotomy between compensable "takings" and noncompensable "regulatory" measures, declaring simply and forcefully that the Fifth Amendment's "... guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." [364 U.S. at 49.]

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), although declining to find a taking because the record did not reveal whether the municipal action had destroyed all viable use or only the most beneficial use, the Court went on to state, "That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation." [369 U.S. at 594.]

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), although finding no taking because the use restrictions preserved a quite profitable use and conferred valuable transferable development rights (438 U.S. at 129, 136), Mr. Justice Brennan stated for the Court that, "As is implicit in our opinion, we do not embrace the proposition that a "taking" can never occur unless government has transferred physical control over a portion of a parcel." 438 U.S. at 123 n. 4. In examining whether the interference with the appellants' property was of such magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]" (438 U.S. at 136, quoting *Pennsylvania Coal*, *supra*, 260

U.S. at 413), Mr. Justice Brennan found that the remaining profitable uses and benefits of the property militated against such a finding. [438 U.S. at 136-138.]

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), although itself a "physical invasion" case [444 U.S. at 180], the Court noted in passing the general principle that a regulation can amount to a Fifth Amendment "taking." [444 U.S. at 174.] No mention is made therein that the compensable taking principle is limited to "occupancy" or "invasion."

In *Andrus v. Allard*, 444 U.S. 51 (1979), although declining to uphold a finding of "taking" due to the plaintiffs' retention of valuable rights [444 U.S. at 66], the Court sanctioned judicial intervention under the Just Compensation Clause where regulatory intrusion offends the dictates of "justice and fairness." 444 U.S. at 65-66. See *Armstrong v. United States*, 364 U.S. 40 (1960).

In *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court acknowledged that when regulation goes "too far," as where it foists upon the few the burden of the many, it will amount to a taking. 444 U.S. at 83, quoting *Pennsylvania Coal*, *supra*, 260 U.S. at 415; *Armstrong*, *supra*, 264 U.S. at 49; and *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), while finding that no taking had been established due to appellants' failure to submit development plans and thereby ascertain just what uses of their property would be or would not be permitted, the Court observed that:

The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978). [447 U.S. at 260 (emphasis added).]

This statement of the rule is precisely on point in the instant action. A jury having found upon substantial evidence

that respondent was denied all economically viable uses of its land, the conclusion follows inexorably that petitioners' actions effected a taking under the Fifth Amendment. See also, *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

The clearest and most cogent statement of these principles to date is made by Mr. Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981). *San Diego's* procedural history is intertwined with that of *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25 (1979), affirmed, 447 U.S. 255 (1980).

In *Agins* the California Supreme Court had incredibly held that a regulation depriving all beneficial use, although nominally a "taking," could not be compensated but only invalidated by mandamus or declaratory relief. California thus has crafted its own novel view of the Fifth Amendment whereby regulatory activity denying all beneficial use, *because* it is "invalid," may not be regarded a compensable taking. 24 Cal.3d at 272.

This interpretation flies in the face of this Court's repeated pronouncements that such deprivations are "takings." It should be noted that this Court upheld the *Agins* result on the much narrower (and much more defensible) ground that the record in that case did not clearly reflect the extent of the diminution of value and remaining permissible use, and thus failed to establish the *fact* of a taking.

Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation. [*Agins*, *supra*, 447 U.S. at 263 (emphasis added).]

In *San Diego*, *supra*, the city had rezoned appellant's industrial land for "open space," rendering it useless to appellant. The state trial court entered after nonjury trial a specific finding that, as in the instant case, "plaintiff has been deprived of all practical, beneficial or economic use of the property" 450 U.S. at 626. A subsequent jury trial on the question of

damages resulted in a judgment for over three million dollars' compensation. *Id.* at 627. The California Court of Appeal, Fourth District, affirmed. *Id.* at 628. The Supreme Court of California, however, granted hearing in the matter (in July of 1978) and in June of 1979 retransferred the case to the Court of Appeal for reconsideration in light of the state Supreme Court's own intervening opinion in *Agins v. City of Tiburon*, *supra*, 24 Cal.3d 266, 598 P.2d 25 (1979).

On retransfer of *San Diego* the Court of Appeal obeyed its instructions and reversed the damages judgment, yet refused to invalidate the regulatory actions, instead offering retrial to establish a mandamus claim. Curiously, this same court that had previously affirmed a finding of compensable taking was then unwilling to declare that the taking was also inherently "invalid" on the same facts.

San Diego Gas & Electric Co., perhaps perceiving that the California courts had erred in declaring that unconstitutional regulatory takings of property are somehow noncompensable, instead appealed to this Court. This Court was sharply divided as to whether, in light of the Court of Appeal's offer of retrial, the Court had a "final judgment" before it. Four justices, in the majority opinion, held that the California Court of Appeal opinion contemplated the necessity of further proceedings below and thus there was no "final judgment" in the case. 450 U.S. at 631-632. Mr. Justice Rehnquist agreed, in a concurring opinion. 450 U.S. at 633-634. Mr. Justice Brennan, writing for four justices, concluded that the California courts had completely and "finally" foreclosed appellants' claim of "taking" by decreeing, in effect, that a taking by zoning can never be a compensable taking under the Fifth Amendment. 450 U.S. at 642.

Despite its apparent numerical division, this Court appeared to be far less divided on the merits of *San Diego* had those merits been reached by the entire Court. The dissent was clear and unequivocal in its expression of support for the concepts which would have upheld the judgment for "compensation" damages. In his concurrence, Mr. Justice Rehnquist made eminently clear his own leanings in that direction:

If I were satisfied that this appeal was from a "final judgment or decree" of the California Court of Appeal, as that term is used in 28 U.S.C. section 1257, I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan. [450 U.S. at 633-634.]

As observed by Mr. Justice Rehnquist, the majority's own opinion on the taking issue notes that "... the federal constitutional aspects of that issue are not to be cast aside lightly ..." 450 U.S. at 633-634.

It is for these reasons that courts and commentators all over the Nation regard Mr. Justice Brennan's dissent in *San Diego* as stating the Court's position on the merits of that case and on the issue whether regulatory actions which deny all beneficial use constitute compensable takings under the Fifth Amendment. See, e.g., *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 151 (1983); *Parbian v. Panagis*, 694 F.2d 476, 482 (7th Cir. 1982); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982); *Devines v. Maier*, 665 F.2d 138, 142 (7th Cir. 1981); *Jentgen v. United States*, 657 F.2d 1210, 1212 (Ct.Cl. 1981); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190 (Ct.Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1199 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *In re Aircrash in Bali*, 684 F.2d 1301 (9th Cir. 1982); *Kinzli v. City of Santa Cruz*, 539 F.Supp. 887, 896 n. 3 (N.D.Cal. 1982); *Pioneer Sand & Gravel v. Anchorage*, 627 P.2d 651, 652 n.2 (Alaska 1981); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484, 494, 188 Cal.Rptr. 191, 196 (1982); *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374, 1383 (Fla. 1981), *cert. denied*, 454 U.S. 1083 (1981); *Pratt v. State*, 309 N.W.2d 767, 774 (Minn. 1981); *Burrows v. City of Keene*, 121 N.H. 590, 597, 432 A.2d 15, 19 (1981); *Sheerr v. Township of Evesham*, 184 N.J. Super. 11, 27-28, 445 A.2d 46, 54 (Law Div. 1982); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 510 (N.D. 1983); *Zinn v. State*, 112 Wis.2d 417, 428-29, 334 N.W.2d 67, 72-73 (1983); Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Con-*

fronts the Inevitable in Land Use Controls, 15 Rutgers Law Journal 15, 47-48, 92 (1983); Rolf, *Notes: Inverse Condemnation: Valuation of Compensation in Land Use Regulatory Cases*, 17 Suffolk U.L.R. 621 (1983); McMurray, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L.R. 711 (1982); Cunningham, *Inverse Condemnation as a Remedy for 'Regulatory Takings'*, 8 Hastings Const. L.Q. 517 (1981); Oakes, *'Property Rights' in Constitutional Analysis Today*, 56 Wash. L.R. 583 (1981); Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty*, 1980 Institute on Planning, Zoning, and Eminent Domain, p. 177, (S.W. Legal Fdn. 1980); Berger, *To Regulate, or Not to Regulate—Is That the Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Rights*, 8 Loyola of L.A. L.R. 253 (1975).

To the extent that any doubts remain as to the correctness of the growing acceptance of the proposition that Mr. Justice Brennan stated the law in his *San Diego* dissent, this case presents an ideal opportunity to resolve them. Bearing no obstacles to such a decision (such as the failure in *Agins* to prove the abolition of all viable use or the "final judgment" problem that divided the Court in *San Diego*), this case squarely presents the question: "Given that a properly instructed jury found upon substantial evidence that appellants' land use restrictions deprived respondent of all economically viable use, does this result, as found by the jury, in a compensable taking under the Fifth Amendment?" The answer, we submit, is a resounding "Yes."

II

A "TAKING" IS A "TAKING" AND MUST CONSTITUTIONALLY BE COMPENSATED

A. The Constitution Commands Compensation

A land-use restriction like that involved in the instant case which denies all economically viable property use meets this Court's oft-stated test for a "taking." *Penn Central*, *supra*, 438

U.S. at 127, 138 n. 36; *Agins*, *supra*, 447 U.S. at 260. The question remains whether such a "taking" is compensable under the Fifth Amendment or whether, as declared by the California Supreme Court in *Agins*, it is somehow noncompensable. The California court in *Agins*, *supra*, 24 Cal.3d 266, 598 P.2d 25 (1979), stated that,

Plaintiffs contend that the limitations on the use of their land imposed by the ordinance constitute an unconstitutional "taking of [plaintiff's] property without payment of just compensation" for which an action in inverse condemnation will lie. *Inherent in the contention is the argument that a local entity's exercise of its police power which, in a given case, may exceed constitutional limits is equivalent to the lawful taking of property by eminent domain thereby necessitating the payment of compensation. We are unable to accept this argument believing the preferable view to be that, while such governmental action is invalid because of its excess, remedy by way of damages in eminent domain is not thereby made available.* [24 Cal.3d at 272 (brackets in original; emphasis added).]

Yet it defies logic and reason to contend that an unconstitutional deprivation of property rights which meets this Court's definition of a "taking" under the Fifth Amendment is not compensable in damages. Since property has been "taken" under this Court's tests for making that determination, and no challenge having been made to the validity of the public purpose being pursued, one need only read the language of the Fifth Amendment to see the fallacy of this argument. "[N]or shall private property be taken for public use, without just compensation." [United States Constitution, Amendment V.]

In *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that the Bill of Rights *implicitly* creates private causes of action for damages for violations of its provisions. How can it be said that the Fourth Amendment *implicitly* commands compensation for an unlawful search, yet the Fifth Amendment does not command compensation for a "taking" of private property when it *explicitly* so commands?

This Court has previously stated that regulatory excess which destroys all value is not only a "taking," but one which requires compensation. In *Pennsylvania Coal, supra*, Mr. Justice Holmes wrote:

When diminution of value reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain *and compensation* to sustain the act. [260 U.S. at 413 (emphasis added); see also, *Penn Central, supra*, 438 U.S. at 136.]

In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), the Court declared:

That is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking *which constitutionally requires compensation*. [369 U.S. at 594 (emphasis added).]

And, of course, that principle is the central theme of Mr. Justice Brennan's "dissent" in *San Diego, supra*. In that opinion, Mr. Justice Brennan stated the rule thusly:

[O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation. [460 U.S. at 653.]

In *Agins v. City of Tiburon, supra*, 24 Cal.3d 266, 598 P.2d 25 (1979), the California Supreme Court held that a landowner who challenges the constitutionality of a zoning ordinance may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." 24 Cal.3d at 273; see, *Agins*, 447 U.S. 255, 259. The "California view," then, appears to be that "an excessive use of the police power" (*ibid.*), ostensibly even where it meets the federal courts' definition of "taking," may not be compensated, either because it is "excessive" or because it is the "police power." This Court has held on many occasions that "police power" actions, albeit

ones that involve occupancy or invasion, can effect *compensable* takings. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). Obviously the phrase "police power" is not itself a magic talisman whereby the Just Compensation Clause may be exorcised and rendered impotent.

Nor is it a defense that because the "taking" results from an action that is "excessive" (violates the Due Process Clause or otherwise exceeds the government entity's powers), the damage already inflicted thereby, the *consummated* "taking," is not compensable. This argument can be reduced to a simple, indefensible precept: "*Because we violated the Constitution when we damaged your property rights, we are immune from recovery of the damage caused you by the deprivation.*" This is, to say the least, a strikingly novel concept in jurisprudence. And, of course, it cannot conceivably be or become the law.

As this Court stated in *General Motors, supra*, it is the fact of the deprivation of the property owner, and not the value of what government gains thereby, that defines a "taking." [323 U.S. at 378.] If the owner's property is "taken," the Constitution commands compensation. From the injured party's perspective, his or her property has been taken irrespective of the niceties of the government entity's right to perform such a taking. Indeed, a landowner would be free to ignore the intrusion but for the ostensible police power exhibited by the public entity.

This Court has previously upheld the validity of the inverse condemnation remedy that the "California view" so stridently rejects. In *Jacobs v. United States*, 290 U.S. 13 (1933), a "physical invasion" case involving flooding of the petitioners' property caused by a government dam project, this Court observed:

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. *The fact*

that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. [260 U.S. at 16 (emphasis added).]

In *Jacobs, supra*, the government effected a "taking" when it flooded petitioner's lands. It could just as easily be said, in the fashion of the "California view," that because the government was obligated to pay but did not promptly offer compensation when it flooded petitioner's lands, such an action would "exceed constitutional limits" and thus be amenable to substantive due process challenge, thereby cutting off the right to compensatory damages. Therein lies the "hitch" in the "California view": If the action taken is "unconstitutional" and amenable to either "due process" invalidation or "taking" compensation, the California and New York courts, for policy-fueled reasons, insist on confiscating this possible election of remedies from the plaintiff and exercising it themselves in only one way as an expression of judicial policy in the guise of a statement of the law. As stated by Mr. Justice Brennan in his *San Diego* dissent, *supra*:

In *Agins v. City of Tiburon*, 24 Cal.3d, at 275, 598 P.2d, at 29, the California Supreme Court was "persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." In particular, the court cited "the need for preserving a degree of freedom in land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy," in reaching its conclusion. *Id.*, at 276, 598 P.2d, at 31. *But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so. See Watson v. Memphis*, 373 U.S. 526, 537-538 (1963). [450 U.S. at 660-661 (footnote omitted).]

In the case of *In re Aircrash in Bali*, 684 F.2d 1301 (9th Cir. 1982), for instance, the Ninth Circuit, whose jurisdiction includes California, expressly repudiated *Agins v. City of Tiburon*, 24 Cal.3d 266, 598 P.2d 25 (1979), probably the leading state court case refusing to even consider damages as a remedy for overregulation. The Ninth Circuit held *Agins* up to the *San Diego* standard and found it wanting:

It has been suggested that one who contests the constitutionality of a law which deprives the claimant of some property interest may not "sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid." [Citing *Agins*.] This does not, however, appear to be the law. Four justices of the Supreme Court have stated that "[t]his holding flatly contradicts clear precedents of the Supreme Court." [Citing the Brennan dissent in *San Diego*.] At least one other Justice has expressed agreement with this view. [Citing the Rehnquist concurrence.] . . . Thus, we take it to be the view of the majority of the Supreme Court that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." [Citing *Pennsylvania Coal* and the Brennan dissent.] Thus, notwithstanding the view of the California Supreme Court, we assume that the excessive exercise of the government's lawmaking powers may constitute a 'taking' under the Fifth Amendment, for which just compensation must be paid. [Citations.] [*In re Aircrash in Bali, supra*, 684 F.2d at 1311 n.7.]

See also, *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 151 (1983).

B. "Invalidation" Alone Fails to Serve the Constitutional Objective

Further, the remedy tendered by the California court in *Agins* is often no remedy at all. Invalidation unaccompanied by payment of damages hardly compensates a property owner for economic loss suffered during the time his property was taken. *San Diego, supra*, at 655. Invalidation takes time. Once a property owner has finally exhausted all his administrative

remedies and waited for his case to be tried and then appealed, he may find himself financially exhausted as well. Many years will have passed, even if he is successful (and even if the entity does not pass a new and equally restrictive regulation in response to the invalidation). During that time, of course, construction costs increase, financing costs increase, taxes (often to the same public entity which is forbidding its use) continue, and so do mortgage payments. Many owners and developers lose their properties by foreclosure during this protracted delay. Time, as they say, is money. In appraising the value of property, its present value is discounted (i.e., reduced) if use and enjoyment are delayed. Too long a delay can reduce the present value to nothing.

How can mere invalidation "remedy" these direct consequences of unconstitutional government action? The answer is obvious—and that is why the framers of the Constitution made it abundantly clear that, when government "takes" private property for the greater public good, it must promptly pay "just compensation."

Further, what is often involved is not a single, discrete regulation but rather a course of conduct consisting of a combination of moratoria, adoption of land use "plans" and ordinances, bond issue campaigns, permit denials, permit grants with unreasonable conditions, publicity, delay, and the like. For example, see *Toso v. City of Santa Barbara*, 101 Cal.App.3d 934 (1980), *cert. denied*, 449 U.S. 901 (1980); *Prince George's County v. Blumberg*, 407 A.2d 1151 (Md.App. 1979), modified, 418 A.2d 1155 (Md. 1980). How does one "invalidate" a dynamic, ever-changing course of conduct?

Invalidation, alone, falls far short of fulfilling the fundamental purpose of the Just Compensation Clause, a guarantee designed to bar the government from forcing some individuals to bear burdens which, in all fairness, should be borne by the public as a whole. *San Diego, supra*, at 656; *Armstrong v. United States, supra*, 364 U.S. 40, 49, 80 S.Ct. 1563 (1960). That is why the Supreme Court recently acknowledged the necessity of damages as a remedy for constitutional depredation: "A damages remedy against the offending party is

a valid component of any scheme for vindicating cherished constitutional guarantees." *Owen v. City of Independence*, 445 U.S. 622, 650-651, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

Only damages will confront policymakers with the real question that must be addressed—Is it worth the cost? What the proponents of uncompensated regulation want is to place that cost solely on the one person who gains no benefit—the regulatee. Society as a whole, which reaps the rewards of the regulation, pays nothing. If government actually had to pay for the benefit obtained from nonuse of land, government would be required to convince its constituents to raise the money. If the people do not want it enough to pay for it, then they should not have it—no matter how much some cloistered planner thinks they would benefit from having it. It is not fair to fob off the cost on innocent third parties who happen to own the land at the wrong time.

Judicial invalidation is the last resort, not the first. It is axiomatic that in examining a legislative enactment for constitutionality the courts seek a construction that will render the enactment constitutional rather than void. The way that courts traditionally deal with the construction of legislation that would be unconstitutional absent compensation is to construe the legislation as requiring compensation. That permits them to uphold, rather than invalidate, the legislation.

For example, in *Hurley v. Kincaid*, 285 U.S. 95, 52 S.Ct. 267 (1932), the Supreme Court reversed an injunction against a threatened uncompensated taking of land. The rationale combined the judicial preference for a valid constitutional interpretation and traditional precepts of equity jurisprudence. The only illegality in the government's plan was its failure to compensate. But compensation may be obtained through an inverse condemnation action. Because there is an adequate legal remedy in inverse condemnation and the legislation would be upheld if a provision for compensation could be implied, injunctive relief (i.e., invalidation) was not available.

The same precept may be seen in the following cases: *Dugan v. Rank*, 372 U.S. 609, 83 S.Ct. 999 (1963); *Fresno v. California*, 372 U.S. 627, 83 S.Ct. 996 (1963); *United States v.*

Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955 (1950); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979); *Penn Central Transp. Co. v. City of New York*, *supra*; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974); *Dames & Moore v. Regan*, 453 U.S. 654 (1981); *In re Aircrash in Bali*, *supra*, 684 F.2d 1301 (9th Cir. 1982).

What the government wants in severe regulation cases is simply nonuse of the property, whether it is to be held at private expense as "open space," or "flood control basin," or "parkland," or "natural watershed," or simply as a "growth control measure" or "density regulation." The reality is that severe land-use restriction can achieve the governmental purpose as effectively as acquisition, and may be able to do so without the need to buy the property.

When the government wants to establish a power plant, it is obvious that the land must be purchased. But what if the government wants to establish a scenic view and/or watershed protection area? Obviously, the land could be purchased and held vacant. But, just as obviously, some innovative and cost-conscious land planners who are operating without an "acquisition budget" have hit on an idea that if they simply provide for stringent development restrictions in the appropriate governing development "plan," while leaving ownership in private hands, the same result can be accomplished without the costs of acquisition and subsequent maintenance. The land planners call this "mere regulation," permissible exercise of the police power. From the government's point of view, the benefits flowing to the public are equally great whether the preservation of open space is created through regulation or through formal condemnation. From the landowner's standpoint, the effect in both cases is to deprive the landowner of all beneficial use of the property, virtually destroying the entire investment in the land. The only difference in consequence to the landowner is the lack of compensation.

Some land planners and government lawyers attempt to define away the problem with semantic gamesmanship. It is suggested that, since the constitutional prohibition relates to a "taking," if one can describe the events with another word

(e.g., "regulation" or, better yet, "mere regulation"), then the Constitution does not apply. This pigeonhole concept of constitutional interpretation violates the most elementary of legal maxims: "The law respects form less than substance."

In a similar vein, in the *San Diego* case, the city implicitly posited the distinction that the government *intends* to take property when it proceeds through eminent domain or physical invasion, but not where it does so through "mere" police power regulations. Mr. Justice Brennan responded (450 U.S. at 653) by quoting Mr. Justice Stewart: "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (emphasis in original).

Justice Brennan concluded:

It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property. [*San Diego*, 450 U.S. at 653.]

Land owners and developers are increasingly confronted with predatory local governments with grandiose goals far beyond their financial capacity—champagne tastes on a beer budget—that seek nonetheless to accomplish their goals by displacing the costs of "progress" upon any available source other than the public fisc. Unfortunately, it is not unknown or particularly uncommon to find local government officials who are openly contemptuous of the rights of property owners and perfectly willing to occasionally (even habitually) cross over the constitutional limits on such predation so long as it remains a "no-risk" venture. One glowing example of this attitude is recited by Mr. Justice Brennan in *San Diego*, *supra*:

Invalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity. At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent California Supreme Court case of *Selby v. City of San Buenaventura*, 10 C.3d 110, appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

"See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war. Good luck." Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, in 38B NIMLO Municipal Law Review 192-193 (1975) (emphasis in original). [450 U.S. at 655 n. 2.]

Justice Holmes foresaw in *Pennsylvania Coal* the "natural" tendency of regulators to nibble away at the rights of property owners:

When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. [260 U.S. at 415.]

Others have more recently observed the same phenomenon:

Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens accompanying "progress" upon individual landowners rather than on the public at large. The allowance of damages for inverse condemnation during the period of the taking, however, should encourage such officials to stay well on the constitutional side of the line, *San Diego Gas & Elec. Co. v. City of San Diego*, *supra* at 1308 n. 26

(Brennan, J., dissenting), and should also discourage harassment of property owners by repeated amendments of zoning regulations and the enactment of new ones. [*Burrows v. City of Keene*, 121 N.H. 590, 598, 432 A.2d 15, 20 (1981).]

[I]nvalidation does not mean that the landowner can proceed to develop his land. In fact, it often means just the opposite, since the landowner then faces a hostile local government, which not only has an arsenal of other controls with which to stymie the landowner, but also may have enough malevolent creativity to enact a regulation only slightly less restrictive than the one invalidated to start the litigation game all over again. [Kmieciak, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 Ind.L.J. 45, 51 (1982) (footnote omitted).]

By the 1970's the character, degree and multiplicity of land use controls had changed to such a marked extent that property owners challenging constitutional infirmities had become, out of financial necessity, more willing to seek damages for a taking. This option has come to be viewed as preferable in two situations: first, when a landowner is convinced that the government, for defensible reasons, wants to prevent the development on his or her private property and regulates accordingly, and second, when the landowner, confident that the government is legally unjustified in its action, believes judicial invalidation would be ultimately futile due to the government's ability to accomplish the same goal through a subsequent and different regulatory device or ordinance, inviting further delay and expense. For example, when ten acre zoning is struck down, five acre zoning may be enacted, or when a subdivision ordinance amendment is declared violative of due process and invalid, the municipality may adopt a sewer moratorium. Invalidation in the land use context is sometimes only a judicial slap-on-the-wrist, and municipalities know it. [Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 69-70 (1983) (footnote omitted).]

Indeed, in the instant case, a jury has entered a verdict and findings, and the district court entered judgment thereon, that respondent's development plans had been approved by petitioners' predecessors under 1973 regulations and that petitioners were estopped from denying approval to respondent's plat submitted in 1981 and from applying post-1973 regulations. *Hamilton Bank, supra*, 729 F.2d at 404. Having been saved from a damages judgment by judgment notwithstanding the verdict (*ibid.*), petitioners did not bother to appeal this "invalidation" judgment. Yet now, before this Court, petitioners argue at length that respondent's plat does not, for numerous reasons, even meet the 1973 regulations and thus cannot be approved thereunder. It can easily be seen that should this Court reverse the Sixth Circuit, abolish the compensatory remedy and reinstate the invalidation remedy alone, respondent's further development efforts are certain to be met not with building permits, but with another long laundry list of obstacles to development and interminable delay and harassment.

C. Governments Can Function Lawfully If They Try

It strains credulity to take seriously the argument that the compensation remedy urged herein will spell the doom of local government or land-use planning. Planning efforts and government in those jurisdictions which have acknowledged the compensation remedy have not collapsed. Similarly, the removal of sovereign tort immunity has not wrought the fiscal disaster its unsuccessful defenders no doubt predicted. Indeed, the onset of government tort liability doubtless generated a heightened concern for injury avoidance—and thereby liability avoidance—that was lacking in some governmental circles during the era of absolute immunity; but change has not impeded government from continuing to function. It has merely caused government to act, as must all other entities, with a heightened consciousness of its responsibility toward the rights of others. Despite the dire warnings of petitioners and their supporters, it is not likely that much more would realistically result in the field of land-use regulation in the event of a clear-cut declaration of an available compensation remedy. It is not so shocking as petitioners suggest that planning agencies must face a sanction for injuring the rights of others. "After all, if a

policeman must know the Constitution, then why not a planner?" *San Diego, supra*, 450 U.S. 621, 661 n. 26 (Brennan, J., dissenting).

D. The Measure of Damages in Temporary Takings

Mr. Justice Brennan cogently addressed head-on the issue of the measure of damages to be applied in his dissent in *San Diego, supra*:

The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a "taking," the government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking" and ending on the date the government entity chooses to rescind or otherwise amend the regulation. Ordinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary "takings" involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory "taking." As a starting point, the value of the property taken must be ascertained as of the date of the "taking." *United States v. Clarke*, 445 U.S., at 258; *Almota Farmers Elevators & Warehouse Co. v. United States, supra*, 409 U.S., at 474; *United States v. Miller*, 317 U.S. 369, 374 (1943); *Olson v. United States*, 292 U.S. 246, 255 (1934). The government must inform the court of its intentions vis-a-vis the regulation with sufficient clarity to guarantee a correct assessment of the just compensation award. Should the government decide immediately to revoke or otherwise amend the regulation, it would be liable for payment of compensation only for the interim during which the regulation effected a "taking." Rules of valuation already developed for temporary "takings" may be particularly useful to the court in their quest for assessing the proper measure of monetary relief in cases of revocation or amendment, see generally *Kimball Laundry Co. v. United States, supra*; *United States v. Petty Motor Co., supra*; *United States v. General Motors Corp., supra*, although additional rules

may need to be developed, see *Kimball Laundry Co. v. United States*, *supra*, 338 U.S., at 21-22 (Rutledge, J., concurring); *United States v. Miller*, *supra*, 317 U.S., at 373-374. Alternatively, the government may choose formally to condemn the property, or otherwise to continue the offending regulation: in either case the action must be sustained by proper measures of just compensation, see generally *United States v. Fuller* 409 U.S. 488, 490-492 (1973); *United States ex rel TVA v. Powelson* 319 U.S. 266, 281-285 (1943). [*San Diego*, *supra*, at 658-660 (footnotes omitted).]

The *San Diego* case itself provides an instructive example of how this principle may be applied. By utilizing the bifurcated trial procedure so as to first determine "taking" liability prior to ascertainment of damages, the government may avail itself of the knowledge that its prior course of conduct constitutes a taking. It may then, as suggested by Mr. Justice Brennan, make an informed decision as to whether to persist in that course of conduct, thereby effectuating a complete and total condemnation of the property and incurring commensurate compensation liability, or to stipulate to such appropriate remedial measures as would terminate the taking, thereby limiting its compensation liability to the damage occasioned the plaintiff in the interim.

III

PETITIONERS INAPPROPRIATELY SEEK TO REARGUE THE FACTS OF THEIR CASE.

While we have devoted our attention to the principal issue in this case, we cannot entirely ignore the thrust of petitioners' attempt to retry the case in this Court. The properly instructed jurors sitting for the trial of this action in the United States District Court for the Middle District of Tennessee have settled all disputed facts in this case. They determined that respondent substantially changed its position and incurred extensive obligations in reliance upon petitioners' previous approval of the Temple Hills project. They determined that the petitioners' subsequent actions denied respondent any economically viable use of its property. These findings were supported by amply

sufficient evidence. Indeed, the jury was supplied with a written statement signed by a majority of the 1973 Planning Commission stating that the planned 736 units had been approved. And the jury was presented with testimony by an expert real estate appraiser that only 67 of the remaining 476 unbuilt units could be constructed in light of the petitioners' subsequent actions—and those at an estimated net loss of over one million dollars.

Petitioners now endeavor, by a lengthy recitation of factual allegations in their petition and brief, to impeach those and other witnesses and proofs. Such an effort necessarily must fail, for it assumes that this Court is to conduct a trial *de novo* rather than an appellate review of the record. Petitioners thus attempt to sidestep the fact that a jury, upon substantial evidence, has decided against them on these issues. Where supported by substantial evidence, as here, that decision may not be disturbed on appeal in the absence of judicial error in the trial court affecting those determinations. In this regard it should be noted that petitioners have not assigned error to the trial judge nor to the instructions given the jury. Rather, they seek to quarrel with the relative weight given by the jury to the proofs presented to them, and the conclusions drawn therefrom.

The verdict of a properly instructed jury cannot be disturbed if it is supported by substantial evidence. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236 (5th Cir. 1983). An appellate court may not reweigh evidence or set aside a jury's verdict merely because the appellate justices could have drawn different inferences or conclusions from the evidence, or feel that other results might be more reasonable. Thus, an appellate court will not overturn the jury's verdict, even though contradictory evidence was presented, if there exists an evidentiary basis for the verdict. *Wood v. Diamond M. Drilling Co.*, 691 F.2d 1165 (5th Cir. 1982), *cert. denied*, 103 S.Ct. 1523 (1983).

It follows that review of this action must proceed upon the jury's inviolable findings of prior approval, detrimental reliance thereon, and subsequent deprivation of economically viable use. The sole issues before this Court are issues of law, not fact,

and specifically, whether regulatory excess amounts to a "taking," and whether such a taking is compensable pursuant to the Fifth Amendment to the United States Constitution. We respectfully urge the Court to answer both questions in the affirmative.

CONCLUSION

This Court has repeatedly upheld the concept that a regulatory action that deprives an owner of property of all economically viable use, as in the instant case, constitutes a "taking" of that property under the Fifth Amendment. Although in only one such instance has the Court had occasion to expressly find such a taking (in *Pennsylvania Coal, supra*), and in that case no claim for compensation was or could have been reached because the government was not a party to the action, Mr. Justice Brennan in *San Diego* made it clear that the Fifth Amendment commands compensation therefor.

Although Mr. Justice Brennan's opinion in *San Diego* is in truth a dissent, it has been widely construed by courts and commentators alike as representing the position of the Court on the issues of taking and compensation addressed therein. Amicus Curiae National Apartment Association respectfully urges that the Court in the instant case affirmatively adopt the views expressed therein so that clouds of doubt lingering over this issue may be dispelled and planners and developers alike may know the law and conform their conduct accordingly.

In the absence of such a declaration of the law, developers and owners of real property will continue to suffer at the hands of regulators who are often ignorant, insensitive, or even openly contemptuous of the constitutional rights of landowners subject to their regulatory caprice and the vagaries of local politics. As stated by Mr. Justice Holmes, it is perhaps simply a function of human nature for the regulators persistently to nibble away at the rights of property owners until, unless deterred, such rights are at last irrevocably destroyed. In some instances this predation appears not simply inadvertent, but willful. Irrespective of the *mens rea* at work, however, it is clear that the "invalidation" remedy alone offers no deterrent whatsoever to the taking of property rights by regulation. Nor does the "invalidation" remedy make the owner whole, as intended by the Fifth Amendment, for what has been taken from him.

Petitioners have apparently determined that the public interest would be best served by preventing development of respondent's land. If this be the case, that which is worth having is worth paying for. Given the options of paying or not paying, and the freedom to obtain what they want either way, it is clear that regulators will opt for the regulatory taking approach for so long as it lacks the tangible impediment of compensatory liability. Even if their actions are ultimately held invalid, the regulators will have served their objective by preventing development for several years, and retain the option of fabricating new and slightly different obstacles to development, thereby furthering their goal of preventing development for several years longer. They get what they want, and it costs them naught.

This Nation is on the brink of a serious crisis in housing availability. Housing development is an incredibly complex undertaking involving long-range planning and financial commitments which the capital investor must gauge in light of the risks entailed. As real property development becomes increasingly vulnerable to the caprice of overzealous, creative regulators, each with their own novel, insular view of the public welfare, investment capital becomes increasingly scarce in the uncertain and unprotective current state of the law.

By declaring that the most excessive extensions of the regulatory police power (those which constitute "takings") will incur compensatory liability, this Court can in one stroke restore investor confidence in a vital industry, guide those regulators who would seek to obey the law, and vindicate the remedy intended by the Fifth Amendment against those regulators who insist upon disregarding the constitutional rights of those they regulate. We respectfully urge this Court to so hold herein so that justice may be done and the law may be known throughout the land. To do otherwise would preserve the current state of affairs, including the very result eschewed by this Court in *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872):

[I]t would be a very curious and unsatisfactory result if in construing the Just Compensation Clause . . . it shall

be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury, to any extent, can, in effect, subject to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. [*Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872) (emphasis in original).]

We respectfully submit that this Court ought not countenance such a result in this case. The judgment of the United States Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, *et al.*,
Petitioners,
v.
HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF OF AMERICAN COLLEGE OF REAL
ESTATE LAWYERS, AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Whether a valid zoning regulation can effect a taking of private property for which just compensation must be paid under the Fifth Amendment of the United States Constitution.

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IN THE
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No. 84-4

WILLIAMSON COUNTY REGIONAL PLANNING
COMMISSION, *et al.*,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

**BRIEF OF AMERICAN COLLEGE OF REAL
ESTATE LAWYERS, AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENT**

Amicus Curiae has received the parties' oral consent to file this Brief and has confirmed the consent in writing by letters dated November 29, 1984 filed with the Clerk of the Court.

INTEREST OF *AMICUS CURIAE*

The purpose of the American College of Real Estate Lawyers, as stated in its charter, is to "gather together lawyers distinguished for their skill, experience and high standards of professional and ethical

conduct in the practice of real estate law who will contribute . . . to the best interests of the Bar and general public, . . . to speak upon matters of interest and importance to real estate law and practice, . . .” Accordingly, the College is interested in the outcome of this case because it concerns a fundamental constitutional question about private real estate property rights, as affected by zoning and similar land use regulations, which has never been decided by the Court. That question is whether a land use regulation, valid on its face, can effect a Fifth Amendment taking for which just compensation should be available to the landowner. Because of the profound constitutional issues involved, as well as the important practical ramifications for those persons particularly concerned with real estate law, the College submits its brief as *amicus curiae* in support of the Respondent.

ARGUMENT

I. This case presents issues which require a decision by the Court on the merits.

The issue before the Court is whether a municipality is required to compensate a landowner whose property has been “taken” by excessive land use regulation (zoning or subdivision controls) commonly referred to as “inverse condemnation.” This case arises from the all too familiar problem of zoning and other land use regulations that interfere with, rather than promote, the greater public good.¹

¹ For a thorough analysis of the question and related issues see Bauman, “The Supreme Court, Inverse Condemnation And The Fifth Amendment: Justice Brennan Confronts The Inevitable In Land Use Controls,” 15 Rutgers Law Journal 15 (1983).

Today, landowners throughout the country are often unable to enjoy fundamental, constitutionally guaranteed property rights because of government land-use regulations which “take” the owner’s personal right to the use of the property. In general, good zoning will preserve or enhance land values by preventing incompatible uses and by comprehensive planning to promote the highest and best use of land.²

At the time the Court upheld zoning as a proper government tool, the perception was that the inevitable course of unregulated real estate development would result in crowded, oppressive, mixed-use and unplanned growth. The laudable objective of zoning was to avoid this perceived chaotic and uncontrolled development, with benefits flowing to the public and to individual citizens alike. On the other hand, carefully controlled planning would assure that proper regulation would achieve the greatest public benefit without unduly burdening private property rights. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

Modern zoning regulations, however, often differ greatly from the early zoning regulations which generated out of the desire to bring order to the chaotic and unregulated growth of urban areas throughout the country.³ Not only is there little empirical evidence to support the Euclid rationale that zoning

² U.S. Department of Commerce, *Standard State & Zoning Enabling Act* (1926) section 3 [Reported in R. Anderson *American Law of Zoning*, Section 30.01 (2d Ed. 1977)].

³ Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 *Urban Law* 2 (1973); Anderson, *American Law of Zoning* 2d, Section 8.01 at 5 (1976).

protects and enhances property values,⁴ but there is great concern that land use regulation as it has evolved in the more than five decades since Euclid, is increasingly being employed to hinder and in some instances to block the most economically efficient use of land.⁵

These extreme forms of regulation, generally enacted without regard for the health, safety and welfare of the community as a whole, frequently end up subsidizing certain favored owners at the expense of others who are either excluded by the lack of housing within their means, or who pay "premium" prices for the restricted housing supply which results from such exclusionary regulation. This kind of zoning is injurious to the public welfare by discouraging the productive use of land and by rewarding speculators in the "down-zoning game" (i.e. favorable zoning changes); this results inevitably in a monopoly on new development and sharp inflation of land prices. The public welfare is harmed when zoning hinders rather than helps efficient free market allocation of housing, employment, commerce and production. This overly restrictive zoning results in forcing unwanted types of development to other municipalities and affords the government entity a bargaining chip in negotiations with landowners seeking permission to develop their property.

⁴ Crecine, Davis & Jackson, *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J. Law and Economics 79 (1967); Reuter *Externalities In Urban Property Markets: An Empirical Test of the Zoning Ordinance in Pittsburgh*, 16 J. Law Econ. 313 (1973); J. McDonald, *Economic Analysis of an Urban Housing Market*, 159-166 (1979).

⁵ Siegan, *Regulating the Use of Land in the Interaction of Economics and Law* 159, 162, 163 (1977).

Many current zoning regulations and techniques are an outgrowth of the fear that the urban community is expanding and threatening to overwhelm the suburbs.⁶ As a result suburban leaders have responded to this fear by using their discretionary zoning power in subtle ways to bar minority and low and moderate income groups from their community.

Currently, landowners seeking relief from the burdens of unduly restrictive zoning ordinances are, with few exceptions, limited to challenging the validity of the ordinance. The invalidation remedy, however, is often inadequate and incomplete, relegating the property owner to the mercies of the offending municipality. Because courts properly defer to legislative discretion in enacting zoning, as in any exercise of the police power, (See *Hawaii Housing Authority v. Midkiff*, 104 S. Ct. 2321 (1984); *Euclid*, supra), a heavy burden of proof is imposed upon the landowner who challenges a regulation to overcome the presumption of validity and convincingly establish that it is not substantially related to the public health, safety and general welfare. Protected from strict review by this judicial deference, municipalities can, with little effort, disguise improper purposes in zoning provisions that have the surface appearance of validity. An excellent discussion of the inadequacy of the validity challenge in dealing with the troubling problem of exclusionary zoning is contained in *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390 (1983).

The cost of litigating such a challenge, especially in light of the difficulties of proof, serves only to further limit the practicality of the remedy. In addi-

⁶ Anderson, *American Law of Zoning* 2d, Section 8.03 (1976).

tion, invalidation is not an affirmative remedy, and a successful challenge will, thus, leave the owner without any approved plan and still confronted by a municipality with the continuing power to rezone the land. Assuming, not unreasonably, that the municipality will not be forthcoming when it rezones following an owner's successful validity challenge,^{6a} it is readily apparent that the situation may deteriorate into repeated challenges and rezoning until the challenge is ultimately unsuccessful or the aggrieved landowner becomes exhausted.

Furthermore, invalidation does not compensate the victorious challenger for the costs or for the interim loss of the full lawful use of the property. As a result, many land owners are either financially unable to protect their constitutional rights in property or, if able to do so, will pass the cost of victory along, thereby inflating housing prices, land costs and rents.

Finally, invalidation does not provide an effective deterrent against regulation which constitutes a taking. This can be avoided only by compelling the municipality to be concerned about potential financial liability and thus causing it to err on the side of non-encroachment on protected rights. *Owen v. City of Independence*, 445 U.S. 622 (1980). A decision by this Court requiring compensation for regulatory taking would not detract from a municipality's right to regulate reasonably, but rather would serve the salutary purpose of becoming a self-correcting mediator between the deleterious purposes of some members of the local community and the constitutionally protected rights of individuals.

^{6a} See *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) n. 22 at 656 (dissent).

Divergent state and federal court interpretations have led to confusion on the question of whether compensation is ever allowed when a regulatory taking occurs (i.e., whether the doctrine of inverse condemnation should be engrafted upon our laws). All of those involved in land use matters along with courts and commentators are awaiting this Court's setting of guidelines for the resolution of this issue. Some courts have concluded that a majority of this Court will adopt Justice Brennan's dissent,⁷ while other courts have decided either that the majority will not adopt his position or that the court has not yet squarely confronted the question.⁸ The resolution of so important a constitutional issue should not rest on mere conjecture engaged in by lower courts but rather should be based upon the solid authority of this Court's sanction.

A satisfactory resolution of this issue will not occur until this Court directly addresses and rules upon the basic issue of when regulation crosses over into the area of a compensable "taking." The establishment of when and whether inverse condemnation occurs will promote judicial efficiency by providing other courts with guidance as to what remedies are available for a government regulation that results in a "taking" of a landowner's property. The establishment by this Court of certainty about what remedies

⁷ *Martino v. Santa Barbara Valley Water District*, 703 F.2d 1141, 1148, 9th Cir. (1983); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 511, N.D. (1983); see also Cases in n.9 infra.

⁸ *Citadel Corporation v. Puerto Rico Highway Authority*, 695 F.2d 31, 33 at Fn. 4, 1st Cir. (1982); *Aptos Seascap Corp. v. The County of Santa Cruz*, 188 Cal. Repr. 191, 195 (1982).

are allowed will permit interested persons, including Courts, municipalities and landowners to focus on the fundamental issue of whether or not a particular zoning ordinance results in a "taking." Thus, until this court resolves the issue, commentators and courts alike will continue to deal with the problem on an *ad hoc* basis without the benefit of authoritative guidelines, lawyers will continue costly litigation of the issue, and legislatures will continue enacting newer and more extensive regulations without, in many instances, considering their ultimate impact upon the landowner's private property interests.

Accordingly, we urge the Court to reach the merits of this case and to adopt Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) in its entirety, since this opinion provides not only a legally correct analysis of the "taking" issue but a practical and fair solution for all parties as well.

II. The Court should affirm the payment of just compensation for a taking effected by zoning regulations.

The decision of the Court of Appeals should be affirmed because the jury's award of just compensation to the Respondent for the loss of the economically viable use of its land, as a direct result of land use regulations imposed by Petitioner, is mandated both by the taking clause of the Fifth Amendment and by the welfare of society as a whole.

The simple clarity of the taking clause has been obscured during the more than half-century of development of the zoning laws since the Court approved the zoning power in *Village of Euclid v. Ambler*

Realty Co., 272 U.S. 365, in 1926. This has been exacerbated by the fact that the Court has thereafter essentially fallen silent and has left the determination of these matters to the state courts. Without the benefit of any decision by the Court applying the taking clause to zoning and similar land use controls, the law has come to hold that the only remedy generally available to correct a burdensome land use regulation is invalidation, and that just compensation is never required because invalidation is adequate to protect the personal property rights of the landowner.

The Fifth Amendment, however, is unequivocal in requiring that no private property may be taken unless just compensation is paid. It establishes both the right and the remedy, which properly interpreted, should leave no room for the argument that the right may be protected by other remedies chosen at the state's discretion. As Justice Rehnquist said, the constitutional meaning of "just compensation" is the "full and perfect equivalent for the property taken." *Penn Central Transportation (Dissent)*, 438 U.S. 104, 150. While invalidation can often be an adequate and full remedy, as a practical matter, this is not always so. Therefore, just compensation must always be available, as in this case, to protect the landowner against takings effected by land use regulations.

Property rights deserve no less protection than personal rights, because they are so interdependent as to be one and the same. As this Court has said:

"Property does not have rights, people have rights. The right to enjoy property without unlawful deprivation, no less than the right to

speak or the right to travel is, in truth, a "personal" right . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."

Lynch v. Household Finance Corp., 405 U.S. 538, 552.

This admonition, that personal and property rights are inseparable, is confirmed by the exclusionary impact of some land use regulations on the personal rights of persons who are unable to afford or to maintain a single-family house on a large lot, or on persons who can only afford lower-cost housing such as apartments, attached houses, or mobile homes. These considerations are augmented by evaluation of the impact on the location of places of employment as well as the impact on the kinds of employment available in a community.

Just as the right of persons to be free from illegal search and seizure and involuntary confessions is not protected solely by the exclusionary rule, but is also protected by compensatory damages, so the right to be free from uncompensated taking of property should not be protected solely by invalidation, but should also be protected by compelling the payment of just compensation.

The taking clause, like the other constitutional protections, must be interpreted and applied in order to achieve its true purpose, which is to insure that the majority act with fairness and justice when imposing any burden on the individual citizen, and not in a formalistic or doctrinaire fashion that sacrifices fairness and justice for expediency or mechanical appli-

cation of legalistic labels. The taking clause is intended to,

"bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Petitioner's argument that the jury's verdict awarding compensation must be set aside lest effective land use regulation for the public good be stopped by the potential for monetary liability, emphasizes the wisdom of Justice Holmes' warning in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) against succumbing to the temptation to excuse violations of the taking clause by resort to the police power. He said, referring to it:

"When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Id. at 415-416.

The Court of Appeals was correct in this case to enter judgment on the jury's verdict awarding compensation to Respondent for injury caused by the improper zoning and subdivision regulations involved. The decision is consistent with the Court's holding that valid regulations can, as applied to specific property, result in a taking of that property, or some part

of it, for which just compensation is mandated by the United States Constitution.

The Court should take this opportunity to remove any doubt that the compensable regulatory taking remedy expressly held to be available in other regulatory settings, is also available where land use regulations are involved.

Up to this time the Court has declined to decide whether zoning regulations can result in a compensable taking (inverse condemnation) when this question was presented previously. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372 (1979), *aff'd* on other grounds, 447 U.S. 255 (1980) (no application for approval, thus no taking); *San Diego Gas & Electric Co.*, *supra* (no final decision below, thus not reviewable). The Court, however, has given every indication that land use regulations can result in takings for which just compensation should be required. Justice Brennan, speaking for four members of the Court in dissent in the *San Diego* case, and addressing squarely the issue of compensable land use regulatory taking, which the majority did not do, held that invalidation was not the exclusive remedy and that an otherwise valid regulation can, under a particular set of facts, effect a taking for which just compensation is required by the Fifth Amendment. In his review and analysis of the taking and property regulation cases, Justice Brennan correctly found that the Court has repeatedly acknowledged that regulation can effect a Fifth Amendment taking.

More significant, however, is his observation that a regulatory taking and an eminent domain taking are not basically different in kind, but are essentially similar exercises of governmental control over prop-

erty. See *San Diego*, 450 U.S. at 651. Stated differently, it is of no help, in analyzing whether a compensable taking has occurred, to categorize the government action as "regulatory" or "eminent domain" because these are merely convenient, and often misleading, labels for exercises of the government's police powers. *Hawaii Housing Authority v. Midkiff*, 104 S.Ct. 2321, 2329 (1984). Since any exercise of police power must meet the substantive due process test of substantial relationship to the promotion of the public health, safety and general welfare, there is always a threshold question of validity, but it is not the end of the inquiry, for,

"If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's rescission of it." *San Diego supra* 450 U.S. at 656 (Brennan dissent).

Because a finding that a regulation is valid has the same character as a finding that an eminent domain action is for the public use, it follows that a finding of regulatory validity does not answer, but instead begs, the question of whether a taking has been effected. In other words, where a landowner is regulated by valid laws, just compensation may still be had if the regulatory effect on the land constitutes a *de facto* taking. On the other hand, an invalid regulation, not enacted for the public health, safety or general welfare so that there is not, as it were, any "public use," will not afford compensation under the taking clause, but will afford damages for deprivation of property without due process. *San Diego*,

supra 450 U.S. at 656 n. 23 (Brennan dissent). The reliance by the Court of Appeals on indications that a majority of the Court shared Justice Brennan's view that a valid land use regulation could result in a compensable taking would appear to be justified.* Most recently, in a unanimous opinion in a straight condemnation case, the Court observed as follows:

"We have frequently recognized that a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property, thus, we have acknowledged that a taking would be effected by a zoning ordinance that deprived "an owner economically viable use of his land."

Kirby Forest Industries Inc. v. U.S., 81 L.Ed. 1d 1, 13 (1984).

In upholding a landowner's claim for compensation for the burden imposed on her apartment building by a state law regulating the relationships among landlord, tenant, and cable television company, the Court rejected the New York Court of Appeals traditional analysis that the regulation was a legitimate use of police power precluding just compensation, holding that although the regulation was valid,

* In accord, *Barbarian v. Panagis*, 694 F.2d 476 (7th Cir. 1982); *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141 (9th Cir.), cert. denied, 104 S.Ct. 151 (1983); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), appeal dismissed, 455 U.S. 901 (1982), aff'd. on remand, 699 F.2d 734 (1983); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266 (Tex.Civ.App. 1975).

"It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."

Loretto v. Teleprompter Manhattan CATV Corp., 102 S. Ct. 3164, 3171.

This Court has likewise pointed out in upholding the enactment of the Federal Surface Mining Control and Reclamation Act, providing for regulation of surface mining, that

"A statute regulating the uses that can be made of property effects a taking if it denies an owner economically viable use of his land . . ." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 296.

If the Court does not intend the foregoing to be applied in the courts of this nation in land use regulation cases, wherein compensation is sought, as the court below did in the instant case, then it must say so now. The Court should take the opportunity presented in the instant case to put to rest any lingering doubts about the availability of just compensation for takings, brought about by excessive land use regulations, by affirming the decision up for review in this case. Here, where the precise question was tried before a jury, for the reasons set forth in *Kirby*, *Loretto*, *Virginia Surface Mining* and Justice Brennan's dissent in *San Diego*, supra, the determination of the court below should be affirmed.

III. The decision of the Court of Appeals sustaining the jury's finding of a compensable taking is consistent with the law and the evidence.

Having concluded, in principle, that a regulatory taking can occur, the inquiry must then turn to whether, as a matter of fact, a taking has occurred in the instant case. This is "a question of degree—and therefore cannot be disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416. This remains as true today as when Justice Holmes stated it more than sixty years ago. In a recent (1978) review of the law concerning the question, the Court began by noting that the definition of a "taking" under the Fifth Amendment "has proved to be a problem of considerable difficulty," going on to add that "this Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-124.

Without in any way limiting the scope of what it conceded to be an essentially case-by-case factual inquiry, the Court identified a few factors from its decisions that had particular significance. Of relevance to the instant case, among these factors, is the economic impact of the regulation, particularly the impact on "investment-backed expectations." *Id.* at 124. A similar factor has been identified subsequently, namely the deprivation of the economically viable use of the land. *Kirby Forest Industries, supra*, at 81 L. Ed. 2d 13, citing *Agins v. Tiburon*. The Court

in *Kirby* also took occasion to reiterate that the underlying principle that is the pole-star guiding the inquiry is "justice and fairness" in apportioning the burdens of government action that each individual shall bear. *Id.*, at 13.

Given the absence (and the impossibility) of a precise judicial definition of a "taking," the jury's verdict was properly sustained by the Court of Appeals. It would be unwise to substitute judicial findings of fact regarding the taking question for those of a jury where the verdict is supported by the evidence, because as a matter of fundamental jurisprudence, factual determinations are preferably left to a jury, especially where community values such as "fairness and justice" and the relative impact of a governmental action on an individual's private property rights are to be determined, as is true in a regulatory taking case.

Furthermore, where, as here, the factors upon which the claim of taking is based (that is, loss of economically viable use and/or substantial impact on investment-backed expectations) are the same factors that will be used to measure the amount of just compensation to be paid, there is less need to put too fine a point on the taking question in the first instance, because the taking and compensation questions are so intertwined. In *Loretto, supra* at 102 S. Ct. 3177, the majority, taking note of the argument that the alleged "taking" had the effect of increasing the value of the owner's property and was, accordingly, not in fact a taking at all, observed that the alleged increase in value would also be relevant to the amount of compensation due, and concluded,

"For that reason, moreover, there is less need to consider the extent of the occupation in determining whether there is a taking in the first instance."

In short, the reviewing courts should not be too ready to hold that no Fifth Amendment taking has occurred because a finer adjustment based on a consideration of all of the relevant factors, can be made (preferably by a jury) in setting the amount of compensation to be awarded.

For these reasons, the Court of Appeals' decision, based on the verdict of the jury, should be affirmed.

CONCLUSION

A remedy awarding "just compensation" would provide the following advantages: it would implement the purpose of the Fifth Amendment, achieve a "fair" outcome, reduce pressures on landowners and courts to use the drastic invalidation remedy to upset comprehensive land-use planning schemes and encourage planning officials to weigh carefully the costs, as well as the benefits, of restrictive land use regulations. On the other hand, this remedy would not chill the government's ability to regulate; rather it would encourage the government to make a more careful, more thorough cost-benefit analysis of the overall impact of the contemplated regulation. The principle enunciated by Mr. Justice Holmes in *Pennsylvania Coal Co. v. Mahon* supra that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter way than the constitutional way of paying for the change" is just as applicable today. The Court should take this opportunity to

affirm the decision of the 6th Circuit and make compensation a viable remedy for landowners whose property has been "taken" by land-use regulation.

Respectfully submitted,

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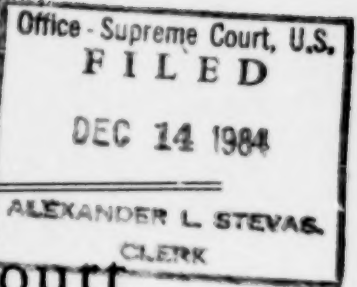
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No. 84-4



In The Supreme Court
OF THE
United States

OCTOBER TERM 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, et al.,
Petitioners,
VS.
HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

**BRIEF AMICUS CURIAE OF
THE IRVINE COMPANY
IN SUPPORT OF RESPONDENT**

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QUESTION PRESENTED

Whether damages should be recoverable under the United States Constitution for a landowner/developer's injuries caused by a local government's application of land use regulations temporarily denying the landowner its reasonable, investment-backed expectation that it may proceed with its previously approved project.

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In The Supreme Court

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OCTOBER TERM 1984

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REGIONAL PLANNING COMMISSION, et al.,
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On Writ of Certiorari to the
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for the Sixth Circuit

**BRIEF AMICUS CURIAE OF
THE IRVINE COMPANY
IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36.2 of the Rules of the Court, *amicus* The Irvine Company, a Michigan corporation ("Irvine"), files this brief *amicus curiae* with the written consent of all parties to the case. The letters granting such consent have been filed with the Clerk of the Court.

Irvine is one of the largest landowners and developers in the State of California. The Irvine Ranch comprises approximately one sixth of the land in Orange County, California. Since the 1960s Irvine has been engaged in the development of the master-planned "new town" of Irvine, California, together with extensive office, commercial, industrial and housing development in adjacent communities. Because it is extensively involved in the land development process and because a majority of its land is located in California, a national innovator in land use regulation, Irvine is greatly interested in the outcome of this case and the potential effects of the Court's decision.

SUMMARY OF ARGUMENT

In the absence of a clear rule extending Constitutional protection to a developer's reasonable, investment-backed expectations arising from reliance upon governmental approvals of a development project, a developer who has made substantial front-end investments in a large-scale planned unit development or planned community project must rely upon judicial application of state law vested rights standards for protection of its interests against subsequent government changes in the rules of development. The protection presently afforded under state law is, however, insufficient.

The Court of Appeals below was correct in its holding that a court's failure to find a project protected under vested rights doctrine is not dispositive of a federal takings claim, because a fundamental difference exists between state law vested rights doctrine and takings jurisprudence. The former fragments a project into discrete segments and identifies those portions, if any, for which a developer has the right to complete construction regardless of subsequent government action or discovery of new facts. The latter, however, examines the nature and extent of a developer's acts of investment which were made at the local government's direction or otherwise in reliance upon the initial governmental approvals and with respect to the property as a whole. This case invites the Court to establish a clear Constitutional rule grounded in the Fifth Amendment's command of "fairness" in order to provide sorely needed protection of a developer's reliance interest.

During the last fifty years, fundamental changes have occurred in the nature and scope of the land development process. The last fifteen years in particular have witnessed an enormous expansion in the array of local government land use regulations. The development flexibility made possible by the new generation of land use regulations interacts with market incentives and the increased capability of the development industry to permit planning and implementation of large-scale, long-term projects. At the same time, however, the inconsistent and unpredictable level of judicial protection afforded the investment required to initiate large-scale development, once it has been approved by local government, has created such a high level of uncertainty and risk in the land development process that large-scale development is becoming increasingly less likely to occur. Thus, the phased, discretionary-approval framework of modern land use regulations, coupled with uncertain judicial protection of private investment under state law vested rights

doctrines, discourages responsible master planning and implementation of large-scale projects of great potential benefit to society. The resulting social costs include excessive investment in smaller, single-phase projects, to which long-range planning techniques are less successfully applied, and increased housing prices.

Petitioners advance several policy considerations as justification for judicial imposition of an invalidation, as opposed to a takings, remedy. These arguments fail, however, not only because they lack empirical support, but also because they consider the effects of an interim damages remedy upon only one of the actors on the development process — the local government.

The availability of a damages remedy for regulatory takings would encourage rather than discourage responsible long-range planning, as this Court has previously recognized. There is at present no effective incentive to encourage local government to give early, comprehensive consideration to development proposals. By protecting developers from a government's last minute change in mind after the developer has made a substantial, reasonable investment in reliance upon the government's prior approvals of a project, imposition of an interim damages remedy will provide local government with an incentive to undertake more thoughtful consideration of projects at the initial approval stage, and discourage attempts to change development rules in midstream.

In conclusion, Irvine suggests criteria for application of a damages remedy based upon the doctrine of reasonable investment-backed expectations. These criteria focus upon standards for determining the reasonableness of investment, the nature of the investment interest to be protected, the extent to which government must be given an opportunity to modify or rescind the challenged regulation, and the measure of damages.

ARGUMENT

The primary issue in this case is whether damages under the United States Constitution should be recoverable for a landowner's injuries caused by the unlawful application of a local land use regulation temporarily denying the landowner its "reasonable, investment backed expectation" that it may put its land to a certain economic use previously approved by the local government.

With respect to that issue, the most consistent policy themes of petitioners and their *amici* are that a damages remedy would cause local fiscal ruin or loss of developmental control: they argue protection of the public treasury and local police power. Of course, the Fifth Amendment does not say: "nor shall private property be taken for public use, without payment of such compensation as may have been budgeted." It does not, by its language, exempt temporary takings from just compensation protections, nor does it excuse compensation on account of a substantial public purpose for the regulation. Yet, petitioners' arguments implicitly recognize that there are social policy choices involved in the selection of remedies. They recognize that the unstated question here is not simply whether the remedy is necessary or appropriate to protect the right secured, but whether it is also appropriate in light of the other social concerns it may advance or retard.

This brief addresses petitioners' unstated question from the perspective of a California landowner-developer which is engaged in establishing and maintaining a large-scale, master-planned, balanced community that accommodates not only the concerns of existing residents, but also attempts to satisfy market demand for a broad range of housing, to create employment opportunities matched to that housing, and to minimize adverse "spillover" effects on neighboring communities.

I

BECAUSE OF THE INADEQUACY OF STATE LAW VESTED RIGHTS DOCTRINE, A CLEAR CONSTITUTIONAL RULE IS NECESSARY TO PROTECT REASONABLE, INVESTMENT-BACKED EXPECTATIONS.

When a local government attempts to apply a new land use regulation to interfere with the completion of a previously approved project, the developer's challenge to the applicability of that regulation will generally be treated under state law as raising a question of vested rights. Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 Hastings L.J. 625, 625 (1978) [hereinafter Cunningham & Kremer, *Vested Rights*]. Although the statement of the vested rights rule is essentially the same in every jurisdiction, whether it is denominated as vested rights, equitable estoppel or under some other rubric, Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. L. Rev. 545, 547 (1979) [hereinafter Hagman, *Estoppel and Vesting*], the rule is applied inconsistently across the states. *Id.*; accord Cunningham & Kremer, *Vested Rights, supra*, at 626.

To understand the potential for inconsistent application of the vested rights doctrine to the same state of facts, one need look no farther than the present case. The lower courts applying Tennessee law found that Hamilton Bank's right to develop was protected by estoppel, even though Hamilton Bank lacked a building permit for the final phases of the project. Under California law, however, regardless of the level of infrastructure investment or the finality of approved plats, the Bank would likely have been found to have neither a vested right arising from its

prior approvals, nor a "property" interest protectable by estoppel.¹

Irvine submits that there is a fundamental difference between the doctrines of vested rights and estoppel, on the one hand, and takings jurisprudence, on the other. Because the vested rights doctrine arose in the context of small-scale projects taking only a few months to construct, the common law rules are singularly "unsuited to resolution of the complexities presented by modern, multi-phase, large-scale projects." Cunningham & Kremer, *Vested Rights, supra* at 626-27.

The vested rights doctrine necessarily fragments a development project into discrete segments and identifies those portions, if any, for which a developer has the right to go forward and complete construction regardless of new government action or discovery of new facts. Application of this rule will have different consequences across the country. In California and other states with a "hard-vesting" rule, no permit or approval except the last one is sufficient to estop the government or to confer a vested right. Hagman, *Estoppel and Vesting, supra*, at 545-46. In other states, such as Tennessee, vested rights or facts

¹E.g., *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 790, 132 Cal. Rptr. 386, 389 (1976) (landowner had spent over \$2,000,000 on subdivision improvements and grading in reliance on the approval of a final subdivision map, but lacked approval for individual building permits); *Oceanic California, Inc. v. North Central Coast Regional Comm'n*, 63 Cal. App. 3d 57, 133 Cal. Rptr. 664 (1976), (despite dedication of a 120 acre park and demonstrated investment in improvements benefiting the entire 5200 acres scheduled for development pursuant to an approved master plan, the developer held no vested right for subdivisions that had not received final plat map approval, nor did owners of individual lots have a vested right to build single family homes in subdivisions that had received final approval prior to the enactment by initiative of the 1972 California Coastal Conservation Act).

giving rise to an estoppel will arise much earlier in the development process.

As the Court of Appeals below specifically held, however, this Court has previously determined that reasonable development expectations supporting a takings claim are defined apart from and independent of state law claims of estoppel. In its alternative holding, the Court of Appeals below declared:

Even if Hamilton had not had a vested right under state law to finish the development, its claim that a taking occurred would not necessarily be foreclosed. Instead of looking to see whether "rights" have been destroyed, the Supreme Court in zoning cases has engaged in an economic analysis of the *degree of interference* with "investment-backed expectations." . . . The jury was entitled to find that Hamilton and its predecessor in interest had a *reasonable expectation* that the development could be completed, in light of the evidence that the commission approved the preliminary plats on numerous occasions with the knowledge that a total of 736 units were intended. This was the developers' "primary expectation concerning the use of the parcel," *Penn Central*, 438 U.S. at 130, 98 S. Ct. at 2662, and was backed by considerable investment in land and improvements.

Hamilton Bank v. Williamson County Regional Planning Commission, 729 F.2d 402, 407 (6th Cir. 1984) (emphasis added).

In contrast to vested rights questions and their parcelized resolution, then, this Court has made it clear that under a takings analysis, in determining whether a developer has a property interest worthy of protection against a local government's application of land use regulations subsequent to initial approval of a project, the

reviewing court must examine the nature and extent of the developer's reasonable, investment-backed expectations with respect to the property *as a whole*. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130 (1978).

Irvine believes that it is now time for the Court to establish, by a clear, majority opinion, a Constitutional rule protecting a landowner's reasonable, investment-backed expectations in completing a previously approved project from government attempts to apply new rules in the middle of development. Such a rule is founded in the Constitution's command of fairness, *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 660 (1981); see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967), and notions of due process. For the Court to fail to promulgate such a rule would be to relegate interests that merit protection under the takings clause to the woefully inadequate or non-existent protection of inconsistently applied state law standards under the vested rights doctrine.

II

FUNDAMENTAL CHANGES IN THE NATURE AND SCOPE OF THE LAND DEVELOPMENT PROCESS HAVE OCCURRED OVER THE LAST FIFTY YEARS.

Beginning with the early decades of this century, a landowner's ability to develop land, which had previously been subject only to private restrictions and public nuisance doctrines, see Ragsdale & Sher, *The Court's Role in the Evolution of Power Over Land*, 7 Urb. Law. 60, 66-72 (1975), gradually became subject to public control through building codes, zoning laws and subdivision regulations. Cunningham & Kremer, *Vested Rights*, *supra*, at 630. In the 1950s these restrictions were extended by

state and federal pollution regulations. *Id.* Beginning in the late 1960s and early 1970s, however, there occurred an enormous expansion in the available array of environmental controls and mandatory municipal and regional planning restrictions. *E.g.*, Hagman, *Estoppel and Vesting*, *supra*, at 577.

The traditional pattern of development in this country was to create "lots first, buildings later." Task Force on Land Use and Urban Growth, *The Use of Land* 246 (W. Reilly ed. 1973). That pattern permitted quantity construction at reasonable prices, because a prospective builder had a choice among lot locations and among sellers. *Id.* Because a subdivider of land could not know how, when or by whom his lots would be used, there was, however, "little incentive to plan for satisfactory social relationships or imaginative physical relationships between landforms and buildings." *Id.* at 246-47. The uncertainty of future use inherent in the "lots-first" process stimulated enactment of early Euclidean or grid zoning and subdivision regulations to curb potential negative effects arising from future development on nearby lots. The result was to reduce impacts upon neighboring development, but at the cost of further constricting the opportunity for imaginative development. *Id.* at 248.

The recent movement toward increased government regulation of land use was in part influenced by a desire to correct perceived deficiencies in the ability of market mechanisms to consider adequately the costs and benefits of proposed development, both locally and at a regional level. Such innovations as planned unit developments and master-planned, balanced communities, in which a broad range of housing is matched to a complementary range of local employment opportunities, represent a natural evolution in the land development process. Increased sophistication and capacities in the development industry, reflecting the industry's enhanced abilities to develop

and build larger scale projects, are responsible to a significant degree for the advent of today's flexible regulations, which can be applied by local government in a discretionary manner to deal with the special problems and opportunities presented by large-scale development proposals. *Id.*

The schematic for local land use regulations today consists of a hierarchy of planning and zoning overlays, coupled with a sequence of discretionary review steps, each of which must be completed before any grading of land or building of improvements can occur. At the top of this regulatory hierarchy stands the local government's General Plan, the community's paramount land use regulation.

In California, the General Plan is the local "constitution for all future development." *O'Loane v. O'Rourke*, 231 Cal. App. 2d 774, 782, 42 Cal. Rptr. 283, 288 (1965); Cal. Gov't Code §§ 65000 *et seq.* (West 1983). It consists of a variety of Elements — Land Use (generally in the form of a planning map and set of policies), Circulation, Housing, Seismic Safety, Noise, Open Space, etc. — which must be consistent, and which together constitute the community's statement for design and implementation of its ultimate goals: what that community finally will look like, and be like, demographically and in terms of its physical and social environment. All subsequent land use regulations, and all project-specific decisions, must conform to the General Plan and all of its Elements.

Under the General Plan are a series of progressively more specific, implementing regulations. The local government is authorized to develop Specific Plans, which are intended to allow identification of more specific policies for discrete areas of the community. Cal. Gov't Code §§ 65450 *et seq.* (West 1983). The local jurisdiction will have a zoning code, which will contain implementing

regulations for the General Plan. Cal. Gov't Code §§ 65800 *et seq.* (West 1983). If the zoning is of the master plan variety, it will also identify extra project approval and implementing procedures, as discussed below.

The community will have a subdivision ordinance, and possibly other similar ordinances (*e.g.*, a traffic phasing ordinance, or inclusionary housing ordinance), specifying those exactions, dedications, reservations, and other conditions that generally will have to be met in order for a landowner to subdivide land prior to development. Cal. Gov't Code §§ 66410 *et seq.* (West 1983). The city will have a grading code, building code, fire code, and electrical code further detailing developmental requirements. And, the city will have a locally adopted procedure for analyzing, at each discretionary review step in a project's course, the environmental consequences and constraints of the project.² Cal. Pub. Res. Code §§ 21000 *et seq.* (West 1983).

Each proposed development must be measured against this structure, through a sequence of discretionary reviews. The proposal may require amendments or variances from established planning and zoning regulations, which can only occur following public hearings and environmental review. The developer will have to obtain approval of a tentative and final subdivision map, unless it is seeking to improve a single lot. In order to record the final subdivision map, it will have to comply with the myriad conditions imposed upon approval of the tentative map: *e.g.*, dedicate land for parks or road rights-of-way, or pay an in-lieu fee (Cal. Gov't Code §§ 66475 *et seq.* (West 1983)); make improvements to adjoining or nearby streets, or bond for that work (Cal. Gov't Code § 66485

²State and Federal provisions impose additional requirements with respect to coastal resources, wetlands, air and water quality management, waste disposal, and similar matters.

(West 1983)); arrange for water and sewer connections, if not installation of new or larger mains, and install or bond for storm drain systems (Cal. Gov't Code § 66483 (West 1983)); provide for open space landscaping and maintenance; and satisfy whatever other conditions the city's planners and legislators deem appropriate. The developer will also have to prepare grading plans, interim run-off management plans, landscape plans (typically to a city-required landscape palette), and finally building plans, before the project can begin.

As noted above, in growing communities the modern trend in the land development process has been for the landowner to proceed by way of master plan zoning devices such as cluster development, as did the developer here, or through the more recent device of planned unit development. Planned unit development ("PUD") is a logical evolution in zoning law. Unlike Euclidean or grid zoning, which tends to treat land two dimensionally and encourage tract development, PUD zoning recognizes the differences in geology, terrain, and environmental factors that are found in larger projects, and recognizes that a community may be better served through an *integrated* mix of uses and residential types, sensitively designed to fit with the natural terrain and environment, than by tract development according to the city's standard zoning ordinance. PUD zoning will typically identify the developable and the undevelopable portions of the project area, specify the variety of uses allowed in the developable areas, establish tailored criteria for set-backs, lot sizes, streets, landscaping, drainage, use mixes, densities, and similar planning concerns, specify a method for phasing development, and require approval of a site plan or plans, and a master tentative map, as the vehicles for more precise development review and control.

Once the site plan or master tentative map has been approved, the *major infrastructure investment* for the PUD

(arterial roads for certain sets of phases, or the whole project, master storm drain systems, master water and sewer mains, reservoirs, etc.) is often required to be installed concurrently with the *first phase* of development, *together with dedications of open space for the whole PUD*, as was done for the present cluster development in case. These infrastructure investments and dedications are in keeping with the master planning effort, which focuses less on the specific needs of that first phase, than upon the project as a whole. And, separate, phase-specific subdivision maps, grading plans, site plans, and building plans consistent with the PUD and the site plan or tentative map will be still required for each subsequent phase.

Both the private developer and the public at large recognize significant benefits from the interaction between these ~~more~~ flexible approaches to land use regulation and the enhanced capability of the development industry to implement them. The ability to perform large scale projects increases the developer's incentives to provide thoughtful, thoroughly planned development. Because the developer realizes that its profits will come from the project as a whole, and slowly over a period of years, or even decades, there is thus a significant incentive toward developing projects of enduring quality, which will maintain or enhance the developer's ability to achieve a satisfactory return on its investment.

Moreover, PUDs and planned community developments, because they permit a developer to offer a mix of uses (*e.g.*, residential, commercial and industrial) and a mix of product lines within use types (*e.g.*, different housing products over a broad range of prices, or diverse opportunities for commercial tenancies), enable a faster absorption schedule, while simultaneously reducing carrying costs and financial exposure in an industry which is

particular sensitive to changes in the economy. Wither-
 spoon, Abbett & Gladstone, *Mixed Use Developments:
 New Ways of Planned Use*, in Urban Land Institute, 4
Management and Control of Growth 240, 243 (Schnidman,
 Silverman & Young eds. 1978). In turn, the industry's
 new capability for large-scale development permits local
 governments to apply more sophisticated techniques in
 evaluating proposed projects. Among other things, this
 enables local governments more easily to evaluate the
 cumulative environmental impacts and other conse-
 quences of proposed development. *Id.* at 250. The mag-
 nitude of large-scale projects also enhances local
 government's opportunity to plan for and to provide a full
 range of urban facilities and services. *Id.* at 249.

Thus, before a project can reach the point where ground
 is first broken, it will have undergone intensive and
 exhaustive public scrutiny and have received repeated
 public approvals. On the basis of those approvals, the
 landowner will have had to make a substantial invest-
 ment, at the time of the subdivision map approval for the
 first phase and at the local jurisdiction's direction, of
 public and private infrastructure improvements required
 on the basis of the project as a whole.

Irvine believes that this is a generally beneficial pro-
 cess. During the course of public review and approval,
 both public and private planning resources are brought
 together in a manner aimed at optimizing the benefits and
 minimizing the adverse impacts of the proposed develop-
 ment. As a result of its participation in this process, the
 landowner/developer's expectation, at least once the
 master tentative map or site plan is approved and the
 City's initial exactions met, is that it has obtained suffi-
 cient public sanction and definition of its project develop-
 ment plan to have that plan merit protection as one of the

identifiable "sticks" in the bundle of rights called "prop-
 erty," to which Fifth Amendment protection will apply.
Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

III

THE FULL POTENTIAL OF ENHANCED DEVELOPMENT CAPABILITY IS NOT PRESENTLY BEING RECOGNIZED.

There is a pressing need for new housing. In California
 alone, approximately 280,000 new housing units need to
 be built annually between 1983 and 1990 just to meet
 existing growth demands of new families; 385,000 hous-
 ing units are so substandard they need to be replaced;
 another 875,000 units are presently in need of rehabilita-
 tion. *Recommendations To Improve The Implementation of
 the California Environmental Quality Act: A Report to the
 Governor From the CEQA/Housing Task Force*, at 1
 (1984) [hereinafter "*CEQA Recommendations*"].

Despite the development of innovative techniques
 which have greatly enhanced the potential for large-scale
 development, the demonstrated demand for new housing
 is not being satisfied. The reasons for failure appear to lie
 largely within the regulatory process.

One consequence of the interaction between the array
 of new land use regulatory devices and the complexities
 of large-scale development has been a substantial length-
 ening of the development process. A recent study by the
 U.S. Government General Accounting Office found that
 the average length of time nationwide for residential
 project approval was 7 ½ months. U.S. General Account-
 ing Office, *Why Are New House Prices So High, How Are
 They Influenced by Government Regulation, and Can Prices
 Be Reduced?* (1978). The length of the development
 process is considerably extended beyond the nationwide
 average in those states with the most comprehensive

regulation of land use. *The Report of the President's Commission on Housing* 182 (1982) In some California cities permit approvals can take up to three years. *Id.*³

The consequences of this lengthening of the development process are disturbing and far-reaching. Recent empirical evidence suggests, for example, that the present level of regulation has significantly increased the cost of housing.⁴

³This data is confirmed by published California cases. *E.g.*, *City of Del Mar v. City of San Diego*, 133 Cal. App. 3d 401, 404 n.1, 183 Cal. Rptr. 898, 900 n.1 (Cal. Ct. App. 1982) (City of San Diego took nine years to complete initial planning approval for first phase of North City West planned community development). Judicial review of the City of Del Mar's challenge to those approvals, which did not yet authorize construction, *id.* at 405, 183 Cal. Rptr. at 901, took an additional three years.

⁴See generally, *Land Use and Housing on the San Francisco Peninsula*, 4 Stan. Env'tl L. Ann. (1982) [hereinafter *Land Use and Housing*]. *Land Use and Housing* contains studies of the communities located on the mid-San Francisco peninsula, an area since the mid-to-late 1960s dedicated to aggressive land use regulation, and in which housing prices in 1981 had risen to amounts 71 percent higher than the national average. *Id.* at 6. One study reported in *Land Use and Housing* found that growth controls in the greater Bay Area were responsible for 18 to 28 percent of housing price increases. Rosen & Kranz, *Growth Management and Land Use Controls: The San Francisco Bay Area Experience*, 9 AREUEA J. 321, 342 (1981), cited in Ellickson, *Preface to Land Use and Housing*, *supra*, at 17-19. Accord Elliott, *The Impact of Growth Control Regulations on Housing Prices in California*, 9 AREUEA J. 115 (1981) (comparative examination between cities without stringent growth controls, cities with growth controls but in an otherwise non-restrictive county, and growth control cities surrounded by other growth control cities), cited in Ellickson, *Preface to Land Use and Housing*, *supra*, at 19:

Using house price data for the 1968 to 1976 period, [Elliott] found that trends in house prices slightly trailed the rate of inflation in cities that did not stringently control growth, and only slightly outpaced inflation in growth-control cities located in counties that did not control growth. Elliott's most interesting and powerful result, however, was that where both a city and the surrounding

Our courts have been slow to recognize another major consequence resulting from the recent evolutionary changes in the nature of the land development process. Major infrastructure costs, previously at least shared by the established community through property taxes, have been shifted to the developers of large-scale projects and have substantially increased the magnitude of development costs. Because these increased development costs must be amortized across the development of an entire project over a period of years, rather than months, there has been a concomitant increase in the severity of the risk that a government will attempt to change the development rules in midstream.

The courts, however, are still applying common law vested rights rules developed to deal with small-scale, short-term development. In light of the increased risk of loss, these rules provide inadequate protection to justify investment in large-scale planned development. The predictable result is that such development is unnecessarily constrained:

"[R]ecent experience [indicates] that many of the large-scale development techniques used in the late 1960s and early 1970s will probably not be used again in the foreseeable future. This especially applies to the purchase of very large tracts of land and the investment of large sums of money in major

county stringently controlled growth, the city's house prices were 50 percent higher in 1976 than they would have been had they just kept pace with inflation."

See also Mercer & Morgan, *An Estimate of Residential Growth Controls' Impact on Housing Prices*, in *Resolving The Housing Crisis* 189 (M. Johnson ed. 1982) (one quarter of rise in house prices in Santa Barbara during 1972-1979 due to growth controls); *The Report of the President's Commission on Housing*, *supra*, at 181 & n.3; *CEQA Recommendations*, *supra*, at 4, (each month of delay in the processing of a housing development proposal adds one to two percent to the cost of the housing).

public facility improvements prior to the marketing of properties to consumers. Most knowledgeable persons in the industry now agree that projects which use these techniques will not be viable when there is extensive regulation of development at the local level and cyclical variations in the national economy. All current evidence points to the fact that the private sector simply will not initiate many large-scale projects in the future, if present public policies are continued. Upward pressure on development costs due to labor and material price increases have always been problems, but they are problems which the development industry has the capacity to adjust to in a slowly improving economy. It can be expected that current constraints on development due to market uncertainties will be overcome and development will resume. The uncertainties and related cost impacts of new public policies, however, are problems of an entirely different magnitude, and the industry has no apparent way to adjust except to reduce other risks by undertaking only smaller projects of very short duration."

Urban Land Institute, *Large Scale Development* 3 (1977).

The present situation poses a severe public policy dilemma. On the one hand, no one wishes to expose municipalities to the threat of harsh fiscal penalties in the event of the proper exercise of their land use regulatory powers. On the other hand, the nature of modern land development requires a much greater degree of certainty, at an earlier time in the development process, than is available at present.

The current uncertainty over whether reasonable investment expectations will be protected, and what that protection will entail, encourages only short-term, incremental development that in no way furthers orderly, comprehensive land use planning and careful project

design and implementation. The practical consequence is thus actively to promote the very perceived deficiencies in the operation of economic markets that innovative land use regulation and long-range planning techniques were created to ameliorate or cure.

If land use regulation is to achieve its stated intent of encouraging master-planning, then the current disincentives for long-term, large-scale projects must be overcome. It is an exercise in futility and a waste of government resources to establish elaborate state and local planning programs if, in reality, few prudent developers will commit themselves to cluster housing, planned unit developments, planned communities, or phasing of infrastructure improvements. Yet, the current state of the law provides inadequate protection for large-scale development. Irvine submits that only a clear Constitutional rule will provide the necessary protection.

IV

PETITIONERS' POLICY ARGUMENTS AGAINST A DAMAGES REMEDY ARE WITHOUT SUBSTANCE.

Petitioners and their *amici* argue that should the Court be disposed to announce a Constitutional rule protecting landowners' reasonable, investment-backed expectations from local government's attempts to change development rules in midstream, the sole remedy should be the practical non-remedy of invalidation of the offending ordinance. In support of this proposition, they advance fiscal and police power policy arguments against establishing a damages remedy for temporary regulatory takings. Their time-worn arguments fail for two reasons: they lack empirical support; and even assuming the validity of such policy considerations, they are insufficient by themselves.

to support suppression of a damages remedy, when compared with the broader range of social concerns that should be appropriately considered by the Court.

A. A Damages Remedy Will Not Bankrupt the Public Treasury.

The most frequent policy consideration advanced by petitioners and their *amici* is that imposition of a damages remedy for temporary regulatory takings would bankrupt the public treasury by imposing an unimaginably large liability upon local governments. Brief Amicus Curiae of City of New York at 11-13; Brief Amicus Curiae of National Association of Counties, et al., at 6; Brief Amicus Curiae of City of St. Petersburg, at 13 n.21.⁵

Petitioners and their *amici* cite no evidence whatsoever in support of this assertion. Notwithstanding the fact that several states, including Tennessee, permit damage recoveries in inverse condemnation, see Brief Amicus Curiae of the United States, at 11, petitioners and their *amici* point to no reported evidence of such raids on public funds. If catastrophic fiscal consequences indeed are threatened, reported cases should contain illustrations of the problem. The absence of such reports, or of empirical studies supporting this premise, leads one to the conclusion, as expressed by one commentator, that this "notion . . . is sheer hyperbole." Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in*

⁵In a related claim concerning adverse fiscal consequences, California pleads that the Tahoe Regional Planning Agency lacks insurance against the possibility of damage awards for temporary takings. Brief Amicus Curiae of State of California, et al., at 16 n.8. Strangely, however, the briefs of petitioners and their *amici* are silent as to the availability of insurance against takings damage awards, either in general, or in the instant case. The potential availability of such insurance has been advanced as a factor mitigating or eliminating the fiscal consequences argument. *E.g.*, Note, *Money Damages for "Regulatory Takings,"* 23 Nat. Res. J. 711, 723 (1983).

Challenging Land Use Regulations, 29 U.C.L.A. L. Rev. 711, 731 n.124 (1982) [hereinafter *Just Compensation*]. Accord Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15, 87 n.415 (1983).

Moreover, recent judicial experience with damage actions brought under 42 U.S.C. § 1983 suggests that the general imposition of constitutional tort liability upon local governments poses no major threat of increased costs. *Owen v. City of Independence*, 445 U.S. 622, 656 (1980); Bauman, *supra*, at 87 n.415; Comment, *Just Compensation, supra*, at 727. There is no reason to suppose that the likelihood of potential interim damages liability for temporary regulatory takings will begin to approach the magnitude of damages exposure for all constitutional torts subsumed under Section 1983 litigation.

B. The Availability of a Damages Remedy for Regulatory Takings Will Encourage, Rather than "Chill," Responsible Long-Range Planning.

Petitioners and their *amici* also argue that the specter of interim damages will chill long-range planning because local governments will be unable to consider applying remedial legislation to halt previously approved development upon discovery of changed circumstances or newly discovered facts, and, further, that local governments will be unable to react to emergencies. *E.g.*, Brief Amicus Curiae of City of New York, at 9. This assertion is a straw man argument of the worst sort.

No one can seriously suggest that government should be prevented from acting freely to further sincere, newly discovered public health and safety concerns, especially those of an emergency nature. *Penn Central*, 438 U.S. at 125-26. The difficulty with petitioners' position is that in

practice it is advanced, not with respect to changed circumstances or newly discovered public health and safety concerns, but rather with respect to newly "discovered" public welfare concerns, *i.e.*, where the government has merely changed its mind after having approved a project and encouraged or required a developer to undertake substantial investments toward development. *See* Brief Amicus Curiae of The National Association of Counties, et al., at 6-7.

Imposition of a damages remedy simply would not have the "chilling effect" envisioned by petitioners. As numerous commentators have noted, and indeed as this Court has previously recognized, the reverse is true. Responsible long-term planning would instead be promoted by imposition of an interim damages remedy for regulatory takings. *San Diego Gas & Electric*, 450 U.S. at 661 n.26 (Brennan, J., dissenting).

The availability of an interim damages remedy for subsequent governmental vitiation of prior approvals should, while discouraging last minute changes of mind, simultaneously encourage local governments to give more careful consideration to the consequences of proposed development projects at the initial application stage. There is at present no effective incentive to encourage local governments to give early, careful and comprehensive consideration to applications for proposed development. Comment, *Just Compensation*, *supra*, at 731 (the fact that a local government knows it has no liability exposure may be an express disincentive to responsible public planning); Note, *Inverse Condemnation: The Case for Diminution in Property Value as Compensable Damage*, 28 Stan. L. Rev. 779, 795 (1976).

While an "interim damages" remedy might have some effect of delaying initial development approval or denying approval entirely in marginal cases, developers will be more able to forecast overall development risks. Thus,

although the planning and processing costs necessary to secure initial project approval may increase somewhat, the resulting decrease in uncertainty should encourage additional construction of better planned, *needed* development.

Perhaps the major failing of petitioners' policy analysis, however, is their one-dimensional focus on the concerns of a single interested party in the land development process — upon the local government, as representative of the established "public interest." Unfortunately, there is great potential that even the best-intentioned local government will inadequately consider the needs of non-residents, and such other greatly outnumbered minority interests as landowners/developers, in reaching its determination of the "public interest." *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 404-06 (1977).

The tension in land use cases in the larger sense, then, is not simply between private profit and the police power, but rather between the values of the existing community and the needs of those who have not yet joined it, as perceived by the supplying marketplace. It is important to remember that although development is a production business, the "commodities" provided by development are not widgets. They are workplaces, marketplaces, recreation facilities, and most importantly housing, as in this case. These commodities are as essential to our existence as is a grand vista, or "a quiet space where yards are wide, people few and motor vehicles restricted." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974).

V

THE COURT SHOULD DEFINE CRITERIA FOR APPLYING AN INTERIM DAMAGES REMEDY BASED ON THE DOCTRINE OF REASONABLE, INVESTMENT-BACKED EXPECTATIONS.

Where government has improperly interfered with investment-backed expectations, under what circumstances should there be compensation for that interference? The following subsections suggest criteria for determining interim damages by focusing on an explication of the terms "reasonable" expectations and "investment-backed" expectations.

A. The Developer's Expectations Must Be Reasonable.

1. The Application of the Challenged Regulation Must Occur Subsequent to Project Approval.

The present case involves a claim of temporary interference with the development of a project arising from an attempt to *apply* new and more limiting regulations to the Temple Hills cluster housing development subsequent to its initial approval. It does not raise the question of whether mere enactment of a land use regulation is a taking. Rather, it involves only the question of the reasonableness of expectations arising from a development approval under one set of regulations, and a local government's subsequent efforts to *apply* different regulations at odds with that approval.

This case considers only the impact of an attempt to truncate an approved project in midstream. Therefore, one criterion to be applied in determining whether an award of interim damages is appropriate should be that a developer's "reasonable expectations" only arise from the developer's acts subsequent to the local government's initial review and approval of a project.

2. Reasonable Expectations do not Encompass Hazardous Conditions or Public Nuisances.

If the question had ever been in doubt, *Penn Central* made it clear that local governments have considerable latitude when it comes to regulating potential harms, such as hazardous waste disposal, and dangerous conditions, such as flood plains. 438 U.S. at 125-26. Another necessary criterion, therefore, is that a developer has no reasonable expectations vis-a-vis regulations which halt previously approved development for legitimate public health and safety concerns discovered following initial approval, or which abate public nuisances.

B. The Developer's Expectations Must Be Backed By Investment.

1. In Commencing Development, the Developer Must in Fact Have Relied Upon Governmental Approval for a Defined Project.

The developer must have taken some definite steps to define and present the overall parameters of the development project to the local government, which resulted in some demonstrable governmental approval defining the overall scope of the project. In the present case the "planning commission approved plans for the development on numerous occasions, and there is considerable evidence that the planning commission intended to and did approve a maximum of 736 units." *Hamilton Bank*, 729 F.2d at 407. The Bank's in-fact reliance upon the prior approvals is evidenced by the fact that between 1973 and 1979 the Bank's predecessor in interest spent between three and five million dollars on project improvements. Brief for Respondent in Response to Petition, at 3.⁶

⁶*Avco* provides a strong contrast and an illustration of the necessity for project definition. One of the major factual questions underlying the decision in *Avco* was the vagueness of the development project for

2. The Investment Should be Demonstrable and Foreseeable.

Most typically a developer's project-wide investments will be made in services (*e.g.* roads, water lines, sewers), the payment of fees (*e.g.*, school fees, in-lieu fees for low and moderate income housing, or park fees) and/or the dedication of land (*e.g.*, for fire stations, schools, parks). Where the developer's investments are of a more generalized nature, (*e.g.*, purchases of materials not physically implanted on the project site, soft costs), the developer should be required to prove that those investments were unique to the approved project, and not transferrable to other property. *See Cunningham & Kremer, supra*, at 716. The developer should be required to bear the burden of tracing each of the foregoing investments back to the development approval and of demonstrating that each was inherent in proceeding into the development process.

C. Government Should Be Given a Legislative or Administrative Opportunity to Modify or Rescind Its Action Before a Damages Remedy Can Be Invoked.

Irvine concurs with the holding in *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981), cited by the dissent below, that "the municipality's governing body" should be "given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity." 643 F.2d at 1200. Given the potential for incurring municipal liability, the local government should be fully apprised of the developer's claim and should be given an opportunity, by means of the developer's resort to the local government's administrative or legislative review process, to decide whether to run the risk of potential liability for

which Avco claimed governmental authorization: there was conflicting documentation as to whether the developer planned to construct 1300, 1600 or 1900 units. 17 Cal. 3d at 794 n.4, 132 Cal. Rptr. at 392 n.4.

interim damages or to rescind or otherwise modify the application of the regulation questioned by the developer. The developer's participation in the local government's review process would put the local government on notice of a potential interim damages claim.⁷

This "notice and opportunity to correct" requirement is analogous to the exhaustion of administrative remedies doctrine. It should not, however, include a requirement of proceeding to litigation as a means of placing government on notice. The time period during which damages are incurred should commence upon conclusion of the local government's legislative or administrative review process and not at the conclusion of litigation demonstrating the impropriety of the local government action. In other words, the opportunity allowed a local government to modify or rescind its action in order to forestall absolutely an interim damages award should end upon conclusion of the local government's legislative or administrative review, rather than upon its subsequent opportunity to rescind under the dictates of a court-ordered remand. Otherwise, a local government could cause a developer substantial economic harm without incurring any costs other than litigation costs arising from its unsuccessful defense of its regulatory action. Under an approach requiring exhaustion of judicial remedies prior to invoking an interim damages remedy, most of the deterrent value of a damages remedy would be lost.

⁷It should be noted that, as suggested, Hamilton Bank did exhaust its remedies in the local government's review process. The Bank's representatives appeared at the November 11, 1980 meeting of the Williamson County Board of Zoning Appeals seeking a ruling that the Bank was entitled to go forward under the 1973 regulations. (C.A. App. 518-33). Although the Board of Zoning Appeals ruled in the Bank's favor, petitioners refused to follow that ruling, and declined to approve the Bank's plat map. (*Id.* at 580).

D. The Measure of Interim Damages Can Be Objectively Determined in an Expeditious Manner.

The dissent in *San Diego Gas & Electric* suggested that "[o]rdinary principles determining the proper measure of just compensation, regularly applied in cases of permanent and temporary 'takings' involving formal condemnation proceedings, occupations, and physical invasions, should provide guidance to the courts in the award of compensation for a regulatory 'taking.'" 450 U.S. at 658-59. Although the measures of compensation cited by Justice Brennan would be perfectly appropriate, Irvine suggests that the Court consider investing the trial court with discretion to use simplified measures of interim damages as warranted by the facts of each case.

The "carrying costs" of a project can be objectively determined without elaborate appraisal procedures other than a mutually agreed upon accounting process. The carrying costs of road, water and sewer systems attributable to development potential that has been delayed can be easily calculated. Similarly the value of fees, including lost interest, attributable to regulatory delay can be objectively determined. The value of dedications and of land left undeveloped for the period of delay could be defined in terms of the difference between annual rental value for the property as it could have been validly regulated and the annual rental value as it was actually regulated. *Windfalls for Wipeouts* 296 (D. Hagman & D. Misczynski eds. 1978) [hereinafter Hagman, *Compensable Regulation*]. Thus, in many cases it would seem unnecessary to undertake elaborate eminent domain valuation proceedings to establish the measure of interim damages.⁸

⁸As a corollary to their "chilling effect" policy argument, petitioner's amici suggest that judicial recognition of an interim damages remedy for regulatory takings will expose local governments to a multiplicity of actions by frustrated or failed developers and result in a substantial

CONCLUSION

Judicial application of state law vested rights doctrine provides insufficient protection for needed development. Changes in the land development process and in the nature and extent of government regulation of land use have fostered a degree of uncertainty which seriously hampers responsible land development practices, especially where long-term, master-planned projects are involved. A uniformly applied, federal Constitutional right and remedy for temporary takings based upon recognition of the developer's reasonable investment-backed expectations is required. Irvine believes that an "interim damages" remedy can be fashioned and drawn with sufficient precision to afford relief to affected landowners while not causing dire fiscal consequences for local government or creating a "chilling effect" on local government regulation of land development. Such a remedy can be narrowly defined with a measure of damages that can be calculated

increase in costs to local government in the form of litigation expenses. Brief Amicus Curiae of the National Association of Counties, et al., at 7; Brief amicus Curiae of State of California, et al., at 19 & n.9. Such an argument is disingenuous at best.

As this Court is well aware, city attorneys have traditionally viewed the merry-go-round of regulation, litigation, and reregulation as a relatively costless technique for control of development. *San Diego Gas & Electric*, 450 U.S. at 655 n.22 (quoting remarks of James Longtin, city attorney for the City of Thousand Oaks, California, before the 1974 annual conference of the National Institute of Municipal Law Officers). Accord Hagman, *Compensable Regulation*, *supra*, at 293; Kmiec, *Regulatory Takings: The Supreme Court Runs out of Gas in San Diego*, 57 Ind. L.J. 45, 51 (1982); Comment, *Just Compensation*, *supra*, at 732-34.

One suspects, moreover, that few developers will be willing to "chill" their future relations with local government by prosecuting damage suits. Thus, seriously pursued interim damages actions would seem to be very unlikely in all but the most egregious instances.

in an objective manner without elaborate proceedings.
Irvine urges the Court to so hold.

Dated: December 14, 1984.

Respectfully submitted,

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DEC 14 1984

No. 84-4

ALEXANDER L. STEVAS
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, *et al.*,
Petitioners,

v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit

**BRIEF FOR RESPONDENT HAMILTON BANK OF
JOHNSON CITY**

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QUESTIONS PRESENTED

1. Whether the application of zoning regulations that results in the total denial to the property owner of the property's use and value constitutes a taking under the Fifth Amendment of the Constitution.

2. When zoning regulations are found to effect a taking, whether the Fifth Amendment requires that the property owner receive just compensation for the time during which his property interest was subject to the regulations, or whether he can only obtain injunctive relief against future application of the regulations.

PARTIES NOT LISTED IN THE CAPTION

WILBURN H. KELLEY, JR.,
 County Judge
MITCHEL BEARD,
 Planning Commission Member
ROBERT MEDAUGH,
 Planning Commission Member
JACK MEAGHER,
 Planning Commission Member
JOE BAUGH,
 Planning Commission Member
CAROLYN WATERS,
 Planning Commission Member
KENNETH MCNEIL,
 Planning Commission Member
CHARLES MOSLEY,
 Planning Commission Member
MORTON STEIN,
 County Planner
THAYER MARTIN,
 County Engineer

Hamilton Bank of Johnson City became a wholly-owned subsidiary of Third National Corporation on December 1, 1982, and on September 20, 1983, formally changed its name to Hamilton Bank of Upper East Tennessee. Other subsidiaries of Third National Corporation are: Third National Bank of Nashville; American National Bank and Trust Company of Chattanooga; Third National Bank in Anderson County; Merchants Bank; The First National Bank of Lawrenceburg; The Union Bank; Third National Bank in Sevier County; Citizens Bank; Bank of Obion County; First National Bank of Rutherford County; Third National Mortgage Company; Third Lease Corporation; Third National Life Insurance Company.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-4

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, *et al.*,
Petitioners,
v.
HAMILTON BANK OF JOHNSON CITY,
Respondent.

On Writ of Certiorari to the United
States Court of Appeals for the Sixth Circuit

**BRIEF FOR RESPONDENT HAMILTON BANK OF
JOHNSON CITY**

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 729 F.2d 402. It is set out in full in the Joint Appendix at 44 to 67. The Order and Memorandum of the District Court granting the Judgment Notwithstanding the Verdict is not reported. It is set out in full in the Joint Appendix at 36 to 42.

JURISDICTION

The jurisdictional facts are correctly stated by Petitioners in their statement of jurisdiction. Jurisdiction of this Court rests on 28 U.S.C § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fifth Amendment to the United States Constitution and 42 U.S.C. § 1983 (recited in Petitioners' Brief at 2).

COUNTERSTATEMENT OF THE CASE

I. Preliminary Statement: Correction of Petitioners' Factual Presentation

Petitioners' Brief is little more than an attempt to rehash all of the disputed factual issues resolved by the jury at trial. The evidence discussed in Petitioners' Brief was rebutted, overwhelmingly, with evidence the jury obviously believed was more persuasive than the evidence presented by Petitioners.¹

This Court has long held that the jury's functions should suffer a minimum of interference and that the jury's determination of factual issues should be accorded great deference, especially in complex cases that are tried over a substantial period of time. *See infra* pages 15-16. This case was tried for fifteen days. Twenty-seven different witnesses testified, some more than once. The transcript of the trial is over 2,000 pages long. The jury's verdict should be affirmed because, after viewing the evidence in the light most favorable to Hamilton and without weighing the credibility of witnesses, it will be abundantly clear that there was material—in fact, overwhelming—evidence in support of the verdict.

¹ The arguments raised in Petitioners' Brief are the same arguments that were raised to, and rejected by, the jury at trial. Specifically, Petitioners' factual assertion that there can be no taking because the developers of Temple Hills never "complied" with any of the applicable regulations was made to the jury in opening statements (R. 40), to the court throughout the trial (R. 1044-45, 1984, 1991, 2017, 2030-31, 2060), and to the jury in closing arguments (R. 2119).

Counsel for Petitioners misstate and miscite the record on numerous occasions. Since many of the misstatements take the form of argument, Hamilton will respond to some of the factual errors in the Argument section of this Brief rather than address those arguments in the Counterstatement of the Case.

Even if the record reflected what Petitioners claim it does, at most they have raised a jury question since the "proof" cited by Petitioners is contradicted by other facts that were presented to the jury. In response, Respondent has assumed that this Court will not function as a trier of fact. Accordingly, Hamilton will not attempt to cite everything in the record that supports Hamilton's claim. Instead, Hamilton will simply address the question whether there was sufficient evidence adduced at trial to support the jury's verdict.

II. Nature and History of the Proceedings

This action was brought by Hamilton Bank of Johnson City (hereinafter "Hamilton" or "Hamilton Bank") pursuant to the Fifth Amendment and provisions of 42 U.S.C. §§ 1983, 1985 against the Williamson County Regional Planning Commission and its individual members and staff (hereinafter "Petitioners"). Hamilton is the owner of 257.65 acres located in the northern portion of Williamson County, Tennessee. (J.A. 374-78, R.610; J.A. 378-91, 818). Hamilton contended that Petitioners illegally and unconstitutionally stopped the development of this property in November 1980, some seven and one-half years after the project had been started in February 1973. (J.A. 5-19). Hamilton contended that the actions of Petitioners violated its federal constitutional rights under the just compensation clause of the Fifth Amendment.²

² Hamilton also asserted other theories of recovery, including claims under the equal protection and due process clauses of the Fourteenth Amendment, and an allegation that Defendants were estopped from retroactively applying new regulations to the Temple Hills Country Club Estates project (hereinafter "Temple Hills"). Those issues are not before this Court.

Hamilton never alleged that Petitioners' actions merely denied Hamilton the highest and best use of Hamilton's property. Nor did Hamilton contend that Petitioners' actions merely diminished Hamilton's investment backed expectations or denied it the most profitable use of its property. Instead, Hamilton proved that Petitioners' actions resulted in the total denial of all economically viable use of Hamilton's property from October 2, 1980, to April 21, 1982. The temporary wipeout of Hamilton's property use occurred because of the imposition of new land use regulations to the Temple Hills project.³

The case was tried from April 5 through April 21, 1982, in the United States District Court for the Middle District of Tennessee, Nashville Division. At the close of all the evidence, the court held that Petitioners had rationally applied the applicable regulations and that Hamilton had not been denied substantive due process or equal protection. (J.A. 37). The case was sent to the jury on the remaining issues of procedural due process, taking without just compensation and equitable estoppel. The court instructed the jury and provided a special verdict form requiring

³ Petitioners rejected Hamilton's request for reapproval of the preliminary plat on June 18, 1981, for eight reasons. Those eight reasons are summarized on page 3 of Plaintiff's Exhibit 01096. (R. 210, 253). A succinct summary of Hamilton's response to Petitioners' eight objections is set forth in a letter that was sent to each member of the planning commission before the June 18 meeting. This letter was from counsel for Hamilton and appears on unnumbered pages 9-15 of Plaintiff's Exhibit 01096. (*Id.*). Much of the trial was consumed with testimony regarding these eight reasons for rejection and whether they should have been applied to Hamilton's property. The record is replete with references which support the jury's verdict that Petitioners should be estopped from imposing these objections. For purposes of this Brief, these objections will be referred to as the "new regulations."

The letter appearing on unnumbered pages 9-15 of Plaintiff's Exhibit 01096 (*Id.*) also goes to the questions of exhaustion of administrative remedies and request for variances discussed *infra* pp. 40-42.

them to answer five questions. (*Id.*). The jury found against Hamilton and in favor of Petitioners on the issue of procedural due process. (*Id.*).

The jury returned a verdict that Hamilton had been denied economically viable use of its property in violation of the just compensation clause of the Fifth Amendment and awarded \$350,000 as compensation. (J.A. 37-38). The jury also found that Petitioners should be estopped under state law from requiring Hamilton to comply with any post-1973 land use regulations. (J.A. 32-33, 37-39).

Petitioners subsequently filed a motion for a judgment notwithstanding the verdict. The court granted the motion in part and denied it in part. The court allowed the jury estoppel verdict to stand and issued a judgment of permanent injunction enjoining Petitioners from requiring Hamilton to comply with any post-1973 regulations. (J.A. 34-42).

The district judge also set aside the \$350,000 verdict because, although he found a "denial of economically viable use," he concluded that no taking occurred because "the denial . . . was temporary until such a time as [Petitioners] were estopped from requiring compliance with the present regulations. Such a temporary denial . . . does not, as a matter of law, constitute a taking under the Fifth Amendment." (J.A. 41).

The Sixth Circuit Court of Appeals reversed the trial court on the inverse condemnation issue and reinstated the jury verdict.

III. The Facts

Hamilton is the owner of 257.65 acres in Williamson County, Tennessee. (J.A. 374-78, R. 610; J.A. 378-91, R. 818). Prior to 1973, this acreage and other property was owned by William Temple, who farmed the land. (J.A. 134). Several individuals interested in developing the property for residential purposes applied to the County Commission

to have the Temple land rezoned from agricultural to residential cluster use. (J. A. 133-34). The former chairman of the Williamson County Regional Planning Commission testified that before Temple Hills was developed, a new zone allowing residential cluster units had to be created. (J.A. 133). In cluster developments, houses may be built on smaller lots than would otherwise be allowed upon the condition that sufficient land within the development be left as "open space." Indeed, the *raison d'être* of the cluster concept is to build upon smaller or more difficult to use portions of a tract in order to use or preserve agricultural, open space, recreational or other features of the property. A considerable amount of debate and study preceded the creation of the Temple Hills residential cluster zone. (J.A. 133, 134-35). The former chairman testified that the developers wanted to build, and the commission wanted to approve, a development that would blend in with the environment and the topography. (J.A. 135-36). The 1973 planning commission even took a bus trip to observe a similar cluster development in Kentucky before approving the Temple Hills project. (J.A. 134-36).

The planning commission was fully aware when it approved the project in 1973 that Temple Hills had steep slopes, some of which exceeded 25%, which was the maximum allowable slope for a building site under the applicable regulations. (R. 450-52). It was the commission's policy, however, to allow houses to be built on hillsides with slopes exceeding 25% because the county was losing much of its good flat land to developments and, in order to protect farming, it was willing to approve hillside building sites such as those located in the Temple Hills development. (R. 340-41, 450-52). Indeed, as a result of this approval and other *de facto* variances, houses were built on many of the steepest slopes before development was stopped. (R. 95, 97).

The 1973 planning commission was also fully aware that the central concept of Temple Hills was to build housing around a private golf course, which would serve as the

necessary open space for the development. (R. 340-42). The planning commission fully participated in making the golf course the open space: it not only approved the project but the secretary of the planning commission also drafted the open space easement, which served to designate the open space by metes and bounds. (R. 341-44). The permanent open space easement, which was recorded by the County, conveyed rights to Williamson County in substantially all of the property in the subdivision except the buildable lots that were to be sold to individuals. (R. 343; Def. Ex. 151, R. 1691). The planning commission's justifiable aim was to make sure that no development could ever occur in the open space without permission of the county. (*Id.*). The developer was locked into the plan approved by the planning commission in 1973 because all the property in the subdivision, except the designated building sites, was subject to the open space easement. The county planner determined that the use of the golf course for open space complied with the applicable regulations, and the planning commission agreed. (R. 350-51).

The preliminary plat approved in 1973 had a notation that the total number of allowable dwelling units was 736. However, lot lines were only drawn in for 469 units; the areas in which the remaining 267 units were to be placed were left blank and bore the notation "This parcel not to be developed until approved by the planning commission." Although Petitioners attached great significance to this statement and argued that the notation limited the total approved density to 469 rather than 736 (R. 122, 123), convincing evidence was introduced to explain this ambiguity and to make clear that the planning commission and the developer agreed in 1973 that density was established at 736 units. (R. 121-24, 218-21, 271-73; Pl. Ex. 9110, R. 1347; J.A. 373, R. 366, 367). Houses have even been built in several of the areas bearing this notation. (J.A. 422, R. 48; J.A. 427, 102, 103; J.A. 91-92; R. 219-21).

It is uncontradicted that density—the number of permitted building sites—was never an issue until 1979. (R. 141). The chairman of the 1973 planning commission testified that 736 units were approved in 1973. (R. 331, 332, 366, 367, 373).⁴

The number 736 was the only number used by the landowners regarding density between 1973 and 1979. That density was determined by using a planning commission formula based on the total number of acres in the project. (R. 449-51). The landowners have been consistent in using that number to describe total density. Hamilton later agreed that the total density should be reduced to 688 units because 18.5 acres of the project had been condemned for the Natchez Trace Parkway. (J.A. 423-24, R. 233-34; J.A. 294-98, R. 173, 199). When Hamilton foreclosed, 212 units had already been built and were not acquired by Hamilton, but had to be counted against total density. Therefore, the total units available to Hamilton was 688 minus 212, or 476 units.

In approving the Temple Hills project, the planning commission knew that it would take ten to twelve years to complete. (R. 348). The commission also knew in 1973 that several million dollars would be spent on the golf course and other improvements, such as sewers and water. (R. 114-17, 344-46). Sewer and water lines had to be brought by the developer from an adjoining town to the project site, and gas lines, underground electricity, telephone lines, roads and drainage all had to be constructed by the developer before the first house was built. (R. 113-14). All of these off-site and on-site improvements were designed to handle 736 units, and three to five million dollars were

⁴ His testimony was corroborated by a majority of the other members of the planning commission who served between 1973 and 1979, as well as by other evidence. (R. 138-40; Pl. Ex. 9110, R. 1347; J.A. 373, R. 366, 367). None of his contemporaries on the commission testified to the contrary.

spent by the developers between 1973 and 1979 on the improvements in reliance on the planning commission's many approvals of the project. (R. 113-15, 858-73).

Consistent with the commission-approved open space easement, most of the flat land in Temple Hills was used for the construction of the golf course and other common improvements. (Pl. Ex. 9705, R. 182, 199). The 212 houses and condominiums that were built were located in different sections of the development and were completed between 1973 and 1980. (J.A. 424-25, R. 233-34; J.A. 427, 101, 103).

The history of the relationship between the owners of Temple Hills and the planning commission can be divided into a pre-1979 period, which was relatively free of problems, and a post-1979 period.

Prior to 1979, two separate approvals had to be secured from the planning commission before a landowner could develop property. First, a preliminary plat had to be submitted, compared with the applicable regulations, reviewed by the staff and approved by the planning commission. (R. 49-53). Later, after additional engineering and on-site work was completed, the owner would submit a final plat for approval by the planning commission. (R. 1199-1200). The preliminary plat of Temple Hills was first approved by the planning commission on February 1, 1973. (J.A. 423, R. 223, 226). On May 3, 1973, a revised preliminary plat was approved. (*Id.*). On June 7, 1973, and January 17, 1974, final plats were approved for Sections I and II, respectively. (*Id.*). On June 6, 1974, a revised preliminary plat and a revised final plat of Section I were both approved. (*Id.*). On August 15, 1974, final plat approval was given to Section III. (*Id.*). A revised final plat was approved for Section II on February 6, 1975. (*Id.*). On June 19, 1975, a revised preliminary plat again received approval. (*Id.*). On August 18, 1977, a revised final plat of Section I was reviewed and approved. (*Id.*; Pl. Ex. 1048, R. 141, 156).

On April 20, 1978, the preliminary plat was reapproved even though ownership of the project had changed hands and the golf course had been sold to a third party. (*Id.*; R. 1233-34). This reapproval, like all previous approvals and reapprovals, was granted under the 1973 regulations even though newer, tougher regulations had been enacted at various times between 1973 and 1979. (J.A. 423, R. 223, 226; J.A. 372-73, 100, R. 199; J.A. 257-61, R. 112, 156; J.A. 262-69, R. 119, 156; J.A. 269-71, R. 120, 156; J.A. 271-72, R. 355; J.A. 272-75, 93, R. 156; J.A. 275-78, 93, R. 156; J.A. 198-99, 91-101). The former planning commission chairman testified that it was the *official policy* to reapprove on-going developments under the regulations that were in effect when the project was originally approved in order to avoid changing the rules of development in the middle of the game, especially when a developer had expended considerable sums in developing the property. (J.A. 140-41, R. 369-71).

It is uncontradicted that prior to August 1979, the planning commission *never* rejected either a preliminary or final plat because the project allegedly failed to comply with 1973 regulations. To the contrary, approvals were expressly made under 1973 regulations. The secretary of the planning commission signed each final plat that was approved, attesting that the project met all applicable regulations. (Pl. Ex. 6501, R. 652, 660).

The official policy was underscored by a *grandfather clause* inserted in the revised subdivision regulations (regulations under which Petitioners claim that Temple Hills fails to pass muster). That clause provided that the developer of an on-going project had the right to continue the project under the regulations that were in effect at the time of the original approval. (J.A. 107-08; Pl. Ex. 7526, J.A. 107-08). Additionally, the legislative body of Williamson County conferred "non-conforming use" status on the Temple Hills project, making it exempt from any post-1973 changes in the applicable zoning laws. (R. 226-31; Pl. Ex. 9711, R. 226, 231).

In August 1979, for the first time, the commission chose to ignore the long history of approvals since February 1973, the grandfather clause and the non-conforming use status conferred on the project by the county's legislative body, and imposed new development standards adopted between 1973 and 1979. (J.A. 97-99, 140-41; J.A. 370-71, 187; J.A. 279-84, R. 160, 199).⁵

On October 2, 1980, the developer submitted the preliminary plat for reapproval, but the commission rejected the application. (J.A. 285-99, R. 173, 199; R. 173, 967, 1703, 1712). On October 3, the secretary of the planning commission wrote to the developer and suggested an appeal of the planning commission's decision to the board of zoning appeals. (Pl. Ex. 9112, J.A. 101, R. 199). This letter was written in response to a question the developer had asked at the October 2 commission meeting regarding his rights and the steps he should take following the commission disapproval. (R. 178). The developer had submitted two plats on October 2. (R. 105). One of the plats was the plat that had received numerous approvals since 1973, and the other plat was one that had been adjusted in an effort to work with the planning commission. (*Id.*). The developer then made application to the board of zoning appeals for interpretation of the regulations, and specifically for a determination of whether the 1973 regulations applied to the project. (J.A. 86-87, R. 179).

⁵ Several witnesses, including state and local officials, testified at trial that this change in policy was the result of defendant county executive Wilburn Kelley's decision to implement a "no-growth" policy in Williamson County. (R. 57-60, 556, 591, 1023-24). A former county planner testified that Kelley was politically motivated and that he was instructed by Kelley to work against the approval or reapproval of any developments, including Temple Hills, even if the developments satisfied the applicable regulations. (R. 59-60). In any event, it is undisputed that shortly after Kelley hired a new county planner, the commission changed its position and imposed new regulations on the Temple Hills development. (J.A. 279-84, R. 160, 199; Def. Ex. 94, R. 1102; Pl. Ex. 1078, R. 164, 199; Pl. Ex. 1079, R. 167, 199; J.A. 91-99, 100-01, 105-07, 198-201).

On November 11, 1980, the board of zoning appeals ruled that the 1973 regulations applied to Temple Hills. (J.A. 328, R. 179, 199; J.A. 163-76; R. 179-80). On November 26, after the board of zoning appeals had reversed the planning commission, Hamilton foreclosed on 257.65 acres of the Temple Hills project. (J.A. 378-91, 189-90). The foreclosure was limited to the undeveloped property and, as Petitioners concede in their brief, did not include the 212 units that had already been built. Brief for the Petitioners at 9. The only property in the Temple Hills project that Hamilton has ever owned, then, are the orange and yellow shaded areas on Plaintiff's Exhibits 9707 and 9708. (J.A. 426, 103, R. 241-42; J.A. 427, 102, 103). As a result of the foreclosure, Hamilton acquired all of the predecessor developer's rights, title and interest in the 257.65 acres. (J.A. 378-91, 189-90).

Prior to 1976, Hamilton had invested \$900,000 in the Temple Hills project. (R. 799). As of the summer of 1977, Hamilton had loaned \$2,400,000 to the project developer. (R. 790). This money was invested in good faith reliance upon previous commission approvals and assurances that all regulations were being met. (R. 789-90).

In an effort to work with the commission and avail itself of all administrative remedies, Hamilton's representatives met with, and requested preliminary plat approval by, the planning commission. (Pl. Ex. 1093, R. 196, 199; Pl. Ex. 9605, R. 197, 199; R. 196-98, 1360). Several witnesses testified that it became obvious from this series of meetings in the spring of 1981 that Hamilton would be unable to reach an agreement with the county because the county kept changing its standards and adding prerequisites to plat approval. (R. 268, 942-45, 959-65).

On June 18, 1981, Hamilton submitted two preliminary plats for consideration by the commission. (Pl. Ex. 1096, R. 210, 253). One was designed to meet several of the commission's objections and the other was the preliminary plat that had been reapproved on numerous occasions since

1973. (*Id.*). Neither of these plats was approved. At the June 18 meeting, the county attorney indicated that it would be futile to appeal the planning commission's decision to the board of zoning appeals again because the commission would ignore any decision made by that board. (J.A. 187-88). As a last resort Hamilton decided to bring this lawsuit. (*Id.*).

SUMMARY OF THE ARGUMENT

The straightforward language of the Constitution, supported by relevant caselaw, noted land use commentators, and the public policy considerations outlined below, makes plain that when public control of private property goes so far as to result in a taking, just compensation is the only appropriate remedy. The just compensation clause, like the due process and equal protection clauses, is grounded in the equity concept of doing what is fundamentally fair under the circumstances of each case. Once a taking has been found to occur, this concept precludes the utterly inflexible remedy rule urged upon this Court by Petitioners and amici.

The Fifth Amendment does not pose the taking question in simplistic terms of "police power" versus "eminent domain power" exercise. Hence remedy cannot be determined by the mere form that government uses to label an action but must be addressed on a case-by-case review of the facts.

Not every harsh regulation is necessarily compensable; but neither can every taking be necessarily uncompensable. At the very least, the right to file an inverse condemnation action for damages surely lies in those few cases in which harsh regulation is alleged to be so onerous as to result in the denial of *all* use of one's property. It is precisely that allegation of a temporary taking that was proven in this case by the evidence and was sustained by both the jury and appellate court below. The compensation remedy is

especially desirable, and necessary, in those rare instances in which government action, though so severe as to effect a taking, is nonetheless valid.

Good land use planning must be governed by fundamental principles of fairness and justice and, absent extraordinary circumstances, must include a consideration of individual rights. The disruption that occurred in this case, however, was the result of the government's irresponsible application of its land use controls.

In these times of more complex and multi-varied governmental actions combining to affect land use, just compensation not only can repair an individual's loss but it can also pierce the veil of a community's exclusionary or excessively arbitrary land use policies. Heavy-handed regulatory conduct, even if struck down as unconstitutional or invalid, all too often reappears in a different guise to accomplish the same restrictive results, namely artificially increased land and housing costs. A damages remedy lessens the likelihood that a community will continue to play freely with the constitutional rights of its citizenry, be they property owners or housing consumers.

This action was originally filed in federal court. After a lengthy trial and a full consideration of all the issues, the jury found that a taking had occurred and compensation was appropriate. The jury verdict was affirmed, after a careful review, by the Court of Appeals. The issue of inverse condemnation is ripe for adjudication.

For this case, at bottom, is about substance over form, equity over legalism, the recognized need for the remedy to fit the wrong, and the right to meaningful judicial access to seek appropriate redress for unmistakable constitutional harm.

ARGUMENT

I. Standard of Review

The standard of review of the judgment notwithstanding the verdict applied by the Court of Appeals below was:

On a motion for judgment n.o.v. as on a motion for a directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. . . . Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal.

Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission, 729 F.2d 402, 404, J.A. 44, 48 (6th Cir. 1984). This is the standard long established by this Court. See, e.g., *Brady v. Southern Railroad*, 320 U.S. 476, 479-80 (1943); *Pennsylvania Railroad Co. v. Chamberlain*, 288 U.S. 333, 343 (1933).

This standard is based on the premise that the jury's functions should suffer a minimum of interference; the jury's determination of issues of fact should be accorded great deference. The reviewing court should not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of the jury. 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2524, at 542-44 (1971).

Furthermore, when reviewing a jury's verdict, the court should view the evidence in the "light most favorable" to the party against whom the motion is made, and that party should be given "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). This court has cited with approval the rule laid down by Professor Moore in his treatise on federal practice:

On appeal, likewise, the appellate court must consider the evidence in its strongest light in favor of the party against whom the motion for directed verdict was

made, and must give him the advantage of every fair and reasonable intendment that the evidence can justify.

Id. at 696 n.6 (quoting 5 *Moore's Federal Practice* 2316 (2d ed. 1951)) (now found at 5A *Moore's Federal Practice* ¶ 50.02[1], at 50-34 to 50-35 (2d ed. 1984)); see also *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648 (1969). Significantly, the Sixth Circuit has carefully reviewed the evidence and found it sufficient both to create an issue of fact for the jury and to support the jury's verdict.

The standard of review is especially pertinent in the instant case, in which Petitioners merely reargue many of the factual issues already resolved by the trier of fact.

II. The Application of Land Use Regulations That Denied Economically Viable Use of Hamilton's Property Effected a "Taking" Within the Meaning of the Just Compensation Clause

The Fifth Amendment states in clear and unequivocal terms:

"[N]or shall private property be taken for public use, without just compensation."

The Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); see *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 241 (1897).

The "taking" allegation in the instant case arises in the context of what is commonly referred to as "inverse condemnation," which, as this Court recently noted, is merely a "shorthand description" for a cause of action against a government defendant in which a landowner recovers just compensation for a "taking" of his property under the Fifth Amendment, even though no formal exercise of the power of eminent domain has been attempted by

the taking agency. *United States v. Clarke*, 445 U.S. 253, 257 (1980).

It is now well-established that a regulation can effect a Fifth Amendment taking. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 158 (1958); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

In last term's *Ruckelshaus v. Monsanto Co.*, 104 S.Ct. 2862 (1984), the Court reaffirmed the vitality of the general principle that a regulation can effect a taking. This principle has been held to apply to zoning laws. *Agins v. City of Tiburon*, 447 U.S. at 260.

A full discussion of this Court's precedents regarding regulatory takings is set forth in Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 647-53 (1981) [hereinafter referred to as *San Diego Gas*, Brennan], and will not be repeated here. See also Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls*, 15 Rutgers L.J. 15 (1983).

This Court has noted that there is no "set formula to determine where regulation ends and taking begins," *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), and that the determination of when a taking occurs "calls as much for the exercise of judgment as for the application of logic," *Andrus*, 444 U.S. at 65. See, e.g., *Ruckelshaus*, 104 S. Ct. at 2874 ("ad hoc, factual inquiry" must determine when "justice and fairness" require that economic injury

by the public be deemed a compensable taking); *San Diego Gas, Brennan*, 450 U.S. at 649; *Penn Central*, 438 U.S. at 124 ("ad hoc, factual inquiries"); *United States v. Central Eureka Mining Co.*, 357 U.S. at 168 ("question properly turning upon the particular circumstances of each case").

Even though the Court has established no "set formula" for determining a compensable taking, this Court "has identified several factors that should be taken into account when determining whether a governmental action has gone beyond 'regulation' and effects a 'taking.'" *Ruckelshaus*, 104 S.Ct. at 2875; see also Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1102 (1981). In *Ruckelshaus*, this Court reiterated that the factors to be considered are the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. *Ruckelshaus*, 104 S.Ct. at 2875; *San Diego Gas, Brennan*, 450 U.S. at 648. The third factor was the focus of this Court's attention in *Ruckelshaus*; the Court held there that "the force of this factor is so overwhelming . . . that it disposes of the taking question. . . ." *Id.*

A. The Economic Impact Of Petitioners' Regulations Was Devastating

In this case, the economic impact of Petitioners' regulations is so overwhelming that it disposes of the taking question. It is well established that there is no taking merely because a landowner's best or most profitable use of the property has been denied. *Penn Central*, 438 U.S. at 125. It is similarly true that mere diminution of property value alone does not constitute a taking. *Id.* at 124. When determining whether a regulatory taking has occurred, the standard is whether "all or most" of a property's economically viable use has been denied. *San Diego Gas, Brennan*, 450 U.S. at 653; *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Agins*, 447 U.S. at

260; *Penn Central*, 438 U.S. at 127; *Armstrong v. United States*, 364 U.S. 40 (1960). The district court properly instructed the jury concerning these points, and also told the jury that "there can be no impermissible taking within the meaning of the Fifth Amendment if the regulations as applied permit economically viable use of the property." (R. 2015). The jury returned a verdict in Hamilton's favor, specifically finding that Petitioners' regulations denied Hamilton all economically viable use of its property. (J.A. 32).

In reviewing this jury verdict, the evidence is overwhelming that a taking of Hamilton's property interest occurred.

One of Petitioners' own witnesses admitted on cross examination that the imposition of the new regulations made it "impossible" to complete the project. (J.A. 427, 102-03; R. 1721).

Uncontradicted testimony at trial showed that the new regulations imposed by the planning commission eliminated 409 potential building sites from the development plan, leaving only 67 scattered building sites, which would result in a loss of over \$1,000,000 to complete the project. (J.A. 159-60). In other words, the cost of finishing the Temple Hills development in compliance with the post-1979 regulations would be in excess of \$1,000,000 over and above any revenues that would be generated from the sale of the completed development. Another witness testified that Hamilton has been unable to sell the property since the new regulations went into effect because no one is interested in investing in a project that offers nothing more than the opportunity to lose over \$1,000,000. (R. 813).

Hamilton's expert appraiser also stated in uncontradicted testimony that the Temple Hills property under the retroactively imposed regulations had "no significant market value other than that which someone would pay for open

space."⁶ He testified that Hamilton's land was "not worth anything" under the heavy burden of the new regulations. (J.A. 162-63).⁷

The Sixth Circuit also noted that "[t]here is no evidence inconsistent with the appraiser's reasoning or conclusion, and his testimony was sufficient to allow the jury to find that with the eight restrictions Hamilton's property had no remaining economically viable use." *Hamilton Bank of Johnson City v. Williamson County Regional Planning Commission*, 729 F.2d 402, 406 n.5, J.A. 44, 52 n.5 (6th Cir. 1984). Indeed, Petitioners' primary contention in this Court, as it was in the Sixth Circuit, is not that Hamilton's property retains an economically viable use, but rather that Hamilton has never complied with either the 1973 or 1977 regulations and thus never acquired vested development rights that could have been taken by the commission.

This argument fails, especially when the evidence is viewed in the light most favorable to Hamilton. The evidence is clear and convincing that, at least under the pre-1979 commission's interpretation of the regulations, Hamilton complied fully.

⁶ The expert previously appraised the project on several occasions. (J.A. 158-59, 161). A summary of his testimony appears in Plaintiff's Exhibit 9850. (J.A. 374-78, R. 610).

⁷ His analysis of the problem created by the overregulation is lengthy and detailed. For example, he noted that while all land has some value just because it is land, the Temple Hills project had "no measurable value" because the property could not be developed economically and there was no reasonable alternative use for the land. (J.A. 162-63). The land is zoned in a manner that will not permit farming, nor is the nature of the land even conducive to farming. (J.A. 134, 162-63). The flat land in the project had already been used for the golf course, and the remaining property was steep and rocky. (J.A. 134, 146, 162-63). The expert's uncontradicted conclusions on the economic infeasibility of developing Temple Hills were corroborated by a land-use planner who testified regarding the impact of Petitioners' demands and by another witness who said that the cost of completing the project under the new regulations would be astronomical. (J.A. 99, 202-07).

As the Sixth Circuit noted in its opinion, the jury determined that Hamilton had acquired a vested right to develop Temple Hills. *Hamilton Bank*, 729 F.2d at 407, J.A. at 53-54. The Sixth Circuit also concluded that Petitioners' actions interfered with Hamilton's reasonable expectation that the development could be completed and that this was "the developers' 'primary expectation concerning the use of the parcel,' *Penn Central*, 438 U.S. at 130, and was backed by considerable investment in land and improvements." *Hamilton Bank*, 729 F.2d at 407, J.A. at 54. Even the district court found that there had been a "significant" interference with Hamilton's investment-backed expectations. (J.A. 40). Petitioners did not appeal this finding. Nor did they appeal the jury's verdict that it would be inequitable and unjust to destroy Hamilton's vested right to develop Temple Hills.⁸ The district court did not disturb the jury's verdict that Petitioners were estopped from destroying Hamilton's vested right to develop Temple Hills. Because no appeal for this verdict has been taken, Petitioners are foreclosed from rearguing whether Hamilton has significant vested rights in the property. *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924).

It is undisputed, then, that Hamilton's vested right to continue developing the subdivision was taken from it during the interim period that Petitioners' regulations

⁸ The judgment of the district court pursuant to Federal Rules of Civil Procedure, Rule 50(c)(1), included a conditional denial of Petitioners' motion for new trial of the issues decided by the jury. (J.A. 41). Petitioners have not "assert[ed] error in that denial," as provided by Rule 50(c)(1), by perfecting an appeal, *see* Petition for Writ of Certiorari at 9, or by asserting this error in its appellate brief or its petition for rehearing. Petitioners' arguments before the court of appeals were limited to support for the judgment notwithstanding the verdict; they did not challenge the district court's conclusion that the evidence established a "denial of economically viable use" (J.A. 41), which the district court held was not a taking merely because it was temporary. (*Id.*). Petitioners and amici cannot now challenge the verdict and argue that there was merely diminution.

were in force. Courts have long recognized the need to shield developers from changes in regulations governing the development process that would unfairly impede ongoing projects, resulting in wasted resources and unacceptably higher risks for the development community, by invoking the intertwining doctrines of vested rights and equitable estoppel to bar application of the new regulations. Estoppel reflects equitable considerations, while the vested rights doctrine has its origins in the constitutional realm. D. Mandelker, *Land Use Law* § 6.12 (1982); Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 Urb. L. Ann. 63, 64-65; see *Kaiser Aetna*, 444 U.S. at 179.⁹

The constitutional basis of vested rights has been noted in modern cases. See, e.g., *Aries Development Co. v. California Coastal Zone Conservation Commission*, 48 Cal. App. 3d 534, 549, 122 Cal. Rptr. 315, 325 (1975); *Life of the Land, Inc. v. City Council*, 60 Haw. 446, 592 P.2d 26 (1979); *Reichenbach v. Windward at Southampton*, 80 Misc. 2d

⁹ Why is the issue so critical now? One reason is that in the past decade or two, building projects have become larger, of longer duration, and more complex. The multiphase project extending over several years of construction is more exposed to alterations in public policy, while at the same time it requires more flexibility to cope with market changes. Also, it seems to be a fact of life that land use regulations are changing more often and more drastically than ever before. In this era of increasing sensitivity to environmental, design, conservation, and other concerns, there are growing pressures to regulate development more closely. In some jurisdictions, slowing or halting growth has become a topic of strong interest. These pressures have led in the past 10 years to more rapid changes in regulation and more restrictive regulations. With every change in plans, zoning boundaries, or land development regulations comes the probability of injury to property holders who expect to develop their properties according to the regulations which were in effect when they made their investments.

C. Siemon, W. Larsen & D. Porter, *Vested Rights: Balancing Public and Private Development Expectations* 3 (Urban Land Inst. 1982) [hereinafter cited as *Vested Rights*].

1031, 364 N.Y.S.2d 283 (N.Y. Sup. Ct.), *aff'd*, 48 A.D.2d 909, 372 N.Y.S.2d 985 (1975), *appeal dismissed*, 38 N.Y.2d 912, 346 N.E.2d 557, 382 N.Y.S.2d 757 (1976). Public policy demands some semblance of reasonable predictability in the land development process, and the further along a development proceeds in gaining all necessary governmental approvals, the more concrete a proposal shapes into reality, the stronger becomes the constitutional notion of fundamental fairness to be accorded the particular landholder.

As Professor Tribe states, "We deal here with the idea that government must respect 'vested rights' in property and contract—that certain settled expectations of a focused and crystallized sort should be secure against governmental disruption, at least without appropriate compensation." L. Tribe, *American Constitutional Law* § 9-1 (1978). Generally, in order to accrue vested rights, a developer must have made substantial expenditures or otherwise committed himself to his substantial disadvantage in good faith reliance on some act of the government prior to the regulatory change. See, e.g., R. Ellickson & A. Tarlock, *Land-Use Controls* 203-04 (1981); C. Siemon, W. Larsen & D. Porter, *Vested Rights: Balancing Public and Private Development Expectations* 13 (Urban Land Inst. 1982). That is also the general rule in Tennessee. *Schneider v. Lazarov*, 261 Tenn. 1, 390 S.W.2d 197 (1965). The record in this case clearly demonstrated to the courts below that Hamilton had acquired all rights to the subdivision, rights that were taken by imposition of the new regulations and merited constitutional protection.¹⁰

A substantial destruction of "investment-backed expectations," as we have here, rises to the level of a

¹⁰ See, e.g., American Law Institute, *Model Land Development Code* § 2-309 (1976); *Vested Rights*, *supra* note 9; Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 Hastings L. J. 623 (1978); Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. U.L. Rev. 545 (1979).

taking of private property for a public purpose, giving rise to a claim under the just compensation clause. *Ruckelshaus*, 104 S.Ct. 2862; *Loretto*, 458 U.S. 419; *San Diego Gas*, Brennan, 450 U.S. at 648; *Agins*, 447 U.S. at 262; *Kaiser Aetna*, 444 U.S. at 175; *Penn Central*, 438 U.S. at 124, 127-28. Hamilton had a reasonable expectation that the development could be completed in light of the evidence that the commission approved preliminary and final plats on numerous occasions, much of the infrastructure was already built for the entire project of 736 units, and the board of zoning appeals had ruled in the owner's favor.

B. A Temporary Taking of the Whole of Respondent's Property Interest Was Found by the Jury and Court Below

The district court reasoned that the estoppel verdict made the total denial of property use only a temporary one, and therefore assumed no Fifth Amendment taking could occur. A temporary denial of property, however, can be a taking and "should be analyzed according to the same framework applied to permanent irreversible 'takings.'" *San Diego Gas*, Brennan, 450 U.S. at 657; see also *Penn Central*, 438 U.S. 104; *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949); *United States v. Causby*, 328 U.S. 256 (1946); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946); *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

Petitioners and amici argue that diminution of property value is all that occurred in this case because they look at the 676-acre Temple Hills development and refuse to separate out Hamilton's property interest. Yet Petitioners' actions denied Hamilton the use of *all* of its property since it was economically infeasible to develop its entire 257.65 acre tract. Petitioners' actions destroyed the right to use its property for the interim period the regulations were in place.

Even if the Temple Hills development is viewed as a whole, adding Hamilton's successor property interest to that of the prior developers, Hamilton's reasonable investment-backed expectations were denied at least to the same extent as they were to the property owner in *Ruckelshaus*. In *Ruckelshaus*, the property owner did not suffer the loss of its entire business or even all of its trade secrets. In fact, a taking occurred, if at all, only with respect to a limited number of trade secrets submitted to the government agency over a limited period of time.

As noted, Hamilton does not own the already developed and sold 212 units, and those units are not part of this lawsuit. Brief for the Petitioners at 9. Petitioners' new regulations and new interpretation of old regulations were never *applied* to those 212 units; only the 257.65 acres owned by Hamilton were subjected to the application of the disputed regulations. In *San Diego Gas*, only a portion of the owner's property was subjected to the regulations in question. In the instant case, *all* of Hamilton's property was subject to the new regulations. It is patently illogical to combine land owned by separate owners over a huge development for the purpose of determining whether one owner's land was taken. Whether the prior developer of Temple Hills made a profit or not on his ownership interest is totally irrelevant. The issue is the economic impact that the application of Petitioners' regulations had on Hamilton.¹¹

¹¹ For example, assume that in 1973 the original developer had divided the project exactly in half and sold 50% of the land to A and 50% of the land to B. Assume further that A completed the development of his portion of the project in five years and made a profit, and that B did not complete his portion of the project in five years. During the sixth year, the commission passes new regulations that, when applied to B's property, deprived B of all economically viable use of his property. Petitioners and amici would argue that one would have to look at the combined financial consequences to A and B in order to determine whether a taking had occurred, since the project was originally

(Footnote continued on next page)

Petitioners and amici cite *Penn Central* in support of their "whole" vs. "part" argument. Trying to tie *Penn Central's* unique circumstances to the facts of this case, however, is futile. There, what was allegedly taken was only *prospective* development expectations, that is, a proposal to build a fifty-five story office tower over the owner's train station. But here, it was vested development rights in an on-going, partially-built subdivision that were taken. In *Penn Central*, no taking occurred because the owners conceded and the Court held that the terminal building was still earning a reasonable return on the owner's investment, the transferable development rights accorded the owner were valuable, and a tax exemption was given the regulated property. But in this case, the owner's property cannot be used as a result of the downzoning; nothing of value is left. In *Penn Central*, the owners claimed that the historic site designation resulted in a taking because of a significant diminution in the property's value. But in this case, there was total denial of economic use.

The Court in *Penn Central* noted that one must look at the owner's property interest as a whole when deciding what is being taken; in that case, the tax block designated as the historic site was deemed the appropriate parcel. In this case, Hamilton's entire realty interest, 257.65 acres, was the subject of the downzoning, and its entire realty interest was, as a result, unusable and could not be sold. Hence Hamilton alleged and proved a temporary taking. *Penn Central* would have been closer to the facts of this case had the Penn Central owners received development approvals from the city, been issued permits, started

(Footnote 11 continued)

approved as a single development in 1973. This argument ignores financial realities and does not offer any guidance as to how one would determine a "whole" project. Whether a taking has occurred should be determined with respect to individual owners and property rights.

construction over the train station, put up steel girders and then been stopped by a newly-applied regulatory scheme. But *Penn Central* did not concern vested development rights.

III. The Just Compensation Clause Requires the Inverse Condemnation Remedy for Application of Regulations that Destroy a Property's Use; Injunctive Relief Alone Is Not an Adequate Remedy

After deciding the threshold issue of whether a taking occurred, the Court must consider whether the jury's award of \$350,000 as just compensation was correct. The language of the Constitution is clear that the government cannot take property without providing "just compensation" for that taking. Based upon that language, the purpose of the takings clause, and the previous decisions of this Court, Justice Brennan concluded that compensation is proper in the land use regulatory context. His carefully considered opinion in *San Diego Gas* provides that when a regulation is found to be so burdensome as to effect a taking, the regulating agency can either amend the regulation to correct its offending nature or can proceed to condemn the property, either by eminent domain proceedings or by continuing the offending regulation. In either event, however, the agency must provide compensation for the time that the regulation deprived the owner of any economically viable use of his property. *San Diego Gas*, Brennan, 450 U. S. at 646-61.

The Sixth Circuit found Justice Brennan's reasoning persuasive in reinstating the jury's verdict. Petitioners and some of their amici take issue with the Brennan analysis.¹²

¹² Significantly, the amici curiae brief of the National Association of Counties, et al., concedes that compensation should be allowed when "egregious circumstances" arise from use of the regulatory power. Brief of the National Association of Counties, et al., at 16.

They urge that injunctive relief is an adequate remedy in all cases involving regulatory takings. They urge the Court to lay down an ironclad rule that compensation can never be awarded based on the harshness of impact on a person. But their arguments ignore the emphasis on individual rights present in the Bill of Rights. See *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971) (damage remedy implicit in Fourth Amendment; of course, the Fifth Amendment just compensation clause provides an explicit remedy).

The Sixth Circuit decision is certainly not unique. In just the last three years, Justice Brennan's opinion has been cited with approval by the Fifth, Seventh, Ninth and Eleventh Circuits, as well as the Court of Claims, whether a taking was found or not, as well as the supreme courts of Alaska, Florida, Minnesota, New Hampshire, North Dakota and Wisconsin. In this same time period, the supreme courts of Illinois, Iowa, Montana, Oregon and Rhode Island agreed that land use takings must be compensable without citing to *San Diego Gas*.¹³

¹³ *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1148 (9th Cir.), cert. denied, 104 S. Ct. 151 (1983); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982); *Devines v. Maier*, 665 F.2d 138, 142 (7th Cir. 1981); *Deltona Corp. v. United States*, 657 F.2d 1184, 1190 (Ct. Cl. 1981), cert. denied, 455 U.S. 1017 (1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1199 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982); *Pioneer Sand & Gravel v. Anchorage*, 627 P.2d 651, 652 n.2 (Alaska 1981); *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374, 1383 (Fla.), cert. denied, 454 U.S. 1083 (1981); *Harris Trust & Savings Bank v. Duggan*, 95 Ill. 2d 516, 449 N.E.2d 69 (1983); *Osborn v. City of Cedar Rapids*, 324 N.W.2d 471 (Iowa 1982); *Prairie v. State*, 309 N.W.2d 767, 774 (Minn. 1981); *Knight v. City of Billings*, 197 Mont. 165, 642 P.2d 141 (1982); *Burrows v. City of Keene*, 121 N.H. 590, 597, 432 A.2d 15, 19 (1981); *Ripley v. City of Lincoln*, 330 N.W.2d 505, 510 (N.D. 1983); *Suess Builders Co. v. City of Beaverton*, 294 Or. 254, 656 P.2d 306 (1982); *Annicelli v. Town of South Kingstown*, 463 A.2d 133 (R.I. 1983); *Zinn v. State*, 112 Wis. 2d 417, 428-29, 334 N.W.2d 67, 72-73 (1983).

The law of takings as it applies to regulatory actions traces its beginnings to the decision by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In that opinion, Justice Holmes wrote that:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . .

Id. at 415. Justice Holmes' opinion clearly contemplates that regulation can effect a taking and that compensation would be paid if such a taking occurred. *San Diego Gas*, Brennan, 450 U.S. at 649-50 & n.14.

Precedent makes clear that once a taking has occurred, compensation must be awarded. The remedy is self-executing. That result was reached over fifty years ago in *Jacobson v. United States*, 290 U.S. 13, 16 (1933) (cited in *San Diego Gas*, Brennan, 450 U.S. at 654-55), where the Court stat-

The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution. The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. *Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.* (emphasis added).

The United States' Brief, in discussing ripeness and mootness, suggests that a limit should be placed on this self-execution. In the federal context, the United States argues that where Congress has not specifically provided a Tucker Act remedy for actions by an agency, injunctive relief, not compensation, is appropriate. "In those circumstances, the court may enjoin the operation of the statute or agency action to the extent it constitutes a taking, not only

because a Tucker Act remedy is not available, but also because Congress did not authorize the agency to engage in action that would constitute a taking and thereby give rise to a claim for just compensation." Brief for the United States at 17 n.12.

The United States implies that *Ruckelshaus* supports this position. In fact, the opposite is true. Where constitutional rights are at stake, the Court is not willing to interpret congressional silence to mean that Congress intended to withhold a remedy mandated by the Constitution. The Court stated:

In determining whether a Tucker Act remedy is available for claims arising out of a taking pursuant to a federal statute, the proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the Court of Claims to hear a suit involving the [statute] 'founded . . . upon the Constitution.'"

Id. at 2881 (citing *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974)). It is not necessary for Congress, nor was it necessary for the state of Tennessee, to give the agency in question the explicit authority to take property in order for Hamilton to obtain monetary relief. To read the just compensation clause otherwise would render it a nullity.

A federal government task force has found that since the early 1970's, rising housing costs have been "greatly exacerbated by" growing local land use regulations that unnecessarily restrict new housing development. "These new factors that have quickened the pace of rising housing costs portend a long-term problem for the future unless major steps are taken." U. S. Department of Housing and Urban Development, *Final Report of the Task Force on Housing Costs* 4 (May 1978); see U.S. General Accounting Office, *Report to the Congress—Why Are New House Prices So*

High, How Are They Influenced by Government Regulations, and Can Prices Be Reduced? 41 (May 1978).

The Douglas Commission, in its exhaustive report to the President and Congress a decade and a half ago, found that certain zoning and other land use control abuses unnecessarily increased housing costs to such a degree as to lead to exclusionary practices relating to residential developments. This frequently resulted when "[t]he community rigs its master plan and accompanying zoning ordinance" with "excessive" standards and prohibitions. One of the Commission's recommendations for a regulation that went so far as to take one's property was that compensation should be paid. This, the Commission thought, would assist in leading toward a more orderly urban development. Report of the National Commission on Urban Problems, *Building the American City* 18-19, 199-253 (specifically 206, 211-17, 224-26, 251) (1968). The Douglas Commission's findings were recently reemphasized and updated in the *Report of the President's Commission on Housing* 177-83, 199-200 (1982).¹⁴

Finally, Petitioners and amici attack Justice Brennan's *San Diego Gas* opinion on a variety of policy grounds. They recite a list of horrors that may occur if courts continue to award compensation for regulatory takings. It is clear, of course, that policy considerations have no place in this analysis given the clear language of the Constitution. *San Diego Gas*, Brennan, 450 U.S. at 661 n.26. Yet, even if policy is granted a role, the arguments by Petitioners and amici are either unfounded or exaggerated, and, in fact, countervailing policy considerations support the award of

¹⁴ See also L. Sagalyn & G. Sternlieb, *Zoning and Housing Costs* (1973); S. Seidel, *Housing Costs and Government Regulations* (1978); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385, 490 (1977); Roberts, *An Appropriate Economic Model of Judicial Review of Suburban Growth Control*, 55 Ind. L.J. 441, 461-64, 487-89 (1980).

compensation. See Comment, *Just Compensation or Just Invalidation: The Availability of a Damages Remedy in Challenging Land Use Regulations*, 29 UCLA L. Rev. 711, 724-32 (1982).

A. Compensation is an Efficient Remedy

Some amici contend that an award of compensation in regulatory taking cases would not lead to an "optimum remedy." Brief of State of California, et al., at 11. In fact, the availability of a compensation remedy for temporary takings should lead to more efficient land regulation. See Blume & Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 Calif. L. Rev. 569, 572, 582, 623-24 (1984). Amici argue as if an award of compensation for a regulatory taking presents a windfall to a landowner. This is decidedly not the case. In fact, the landowner suffers an extreme loss during the time the regulation is in place. This loss is imposed on the landowner by an activity being performed for the public good, i.e., land regulation. The just compensation clause represents a judgment that when this loss reaches a certain size, it must be borne by the public at large. *Agins*, 447 U.S. at 260; see D. Hagman & D. Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* (1978). If this burden were not shared, the imposition of regulations, except for possible litigation expenses, would be costless. A governmental entity would therefore have no incentive to avoid the imposition of effectively destructive regulations.

The just compensation clause does not achieve an optimal solution. It operates only in egregious cases to, as Professor Tribe puts it, "limit arbitrary sacrifice of the few to the many." L. Tribe, *American Constitutional Law* § 9-4 (1978); see Bauman, *supra*, at 59-69 (discussing "philosophical imperative" underlying inverse condemnation). Complementing the efficiency argument is the even more fundamental point that the Fifth Amendment demands "fairness" in its administration. *San Diego Gas*, Brennan,

450 U.S. at 656, 660. Still, the award of compensation offers some check, even if small, on clear overuse of the zoning power.

B. Compensation Will Not Chill the Exercise of Necessary and Proper Governmental Actions

Amici perceive, rightly, that awards of compensation may result in some decrease in the degree of zoning activity. But the decrease will only be in unconstitutional activities. Compensation will have a salutary effect on proper planning by reducing the incentive for regulatory actions that result in uncompensated takings. As Justice Brennan points out, "[i]nvalidation hardly prevents enactment of subsequent unconstitutional regulations by the government entity." *San Diego Gas*, 450 U.S. at 655 n.22. That opinion quotes a California city attorney advising other city attorneys that "IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN." *Id.* Compensation serves not only as a remedy but also as a deterrent to future misconduct.

When the effect of regulations is found to be excessively harsh, the governmental agency has the choice of permanently taking the property interest or amending the regulation. The only money that it must pay is compensation for the interest for the time during which the regulations were in place. Finally, as Justice Brennan notes, "one may wonder as an empirical matter whether the threat of just compensation will greatly impede the efforts of planners." *San Diego Gas*, 450 U.S. at 661 n.26. Certainly in the years the inverse condemnation remedy has been available in the lower courts, American land use planning has been as vigorous as ever.

C. The Compensation Remedy Will Not Result in a Run on the Municipal Fisc

Despite amici's rhetoric, they offer no support for their fears of fiscal disaster. No such public ruin has occurred in

the analogous lifting by the courts of sovereign immunity for tort, and a taking is much harder to prove than the commission of a tort. This Court has recognized that "government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law," *Penn Central*, 438 U.S. at 124 (quoting *Pennsylvania Coal*, 260 U.S. at 413). Accordingly, the courts have made clear that a taking through zoning regulations can be found only in extreme circumstances based on case-by-case determinations. As Justice Harlan said in his *Bivens* concurrence, the "social values" emphasized in the Constitution are more important than preventing fiscal and judicial resources from being stretched further by recognition of a damages remedy for abusive state action. *Bivens*, 430 U.S. at 410-11.

D. Awarding Compensation Does Not Transfer the Power of Eminent Domain from Legislatures to the Judiciary

This argument, like the ones above, ignores the limited scope of relief that Hamilton sought. Hamilton is not asking the Court to force Petitioners to condemn the land in question. That is clearly a decision that only Petitioners should make. Rather, Hamilton seeks only to recover compensation for a taking that has already occurred. Amici concede that "it is indisputably the court's obligation to determine whether a regulatory measure effects a taking in a particular case." Brief of State of California, et al., at 14. For amici then to contend that the court cannot enforce a constitutionally mandated remedy is to infringe upon the role of the judiciary.

Petitioners and some amici contend that the only proper remedy for any taking in the regulatory context is injunctive relief. The amici States suggest that the reviewing court retain jurisdiction over the dispute until the regulatory body enacts constitutional regulations. Brief of State of California, et al., at 8-9. Yet this scheme is contrary to the

traditional doctrine that a court will impose equitable remedies only where the legal remedy is inadequate. It would also interject the courts directly into the land use regulatory process on a continuing jurisdictional basis, which would be an inefficient use of judicial resources. With compensation for a temporary taking in the limited number of cases that can prove a taking, a community is free to keep, revoke or amend the offending regulation.

It is black letter law that an injunction is an extraordinary remedy; it "is not a remedy which issues as of course." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (citing *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-38 (1933)). This Court has "repeatedly held" that the basis for injunctive relief in the federal courts is a showing of irreparable injury and the inadequacy of any legal remedy. *Weinberger*, 456 U.S. at 312; see also *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 60 (1975); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1972); *Beacon Theatres v. Westover*, 359 U.S. 500, 506-07 (1959).

For the taking of property, whether by regulation or by physical occupation, there exists an adequate remedy at law. That remedy is set forth in the just compensation clause. As this Court has noted, "[t]he payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken." *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473-74 (1973); *United States v. Reynolds*, 397 U.S. 14, 16 (1970). And in *Ruckelshaus*, 104 S.Ct. at 2880, the Court stated:

Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking. (citations omitted).

Respondent respectfully suggests that amici's argument is backwards, and that, in fact, the granting of monetary

relief will be far less intrusive than the close supervision of the zoning process advocated by amici.

IV. Respondent's Suit is Ripe for Adjudication

Petitioners and amici raise a number of strained arguments regarding ripeness, mootness, exhaustion of administrative remedies and exhaustion of state judicial remedies. By mixing these objections, Petitioners and amici no doubt hope to achieve a synergistic effect that no single argument could accomplish. Contrary to their arguments, however, the inverse condemnation issue in this case is ripe for disposition by the Court.

In *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191-92 (1959), this Court noted:

It is suggested, however, that abstention is justified on grounds of avoiding the hazard of friction in federal-state relations any time a District Court is called on to adjudicate a case involving the State's power of eminent domain, even though, as in this case, the District Court would simply be applying state law in the same manner as would a state court. But the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to sovereignty. Surely eminent domain is no more mystically involved with "sovereign prerogative" than a State's power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue certain bonds without a referendum, its power to license motor vehicles, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law. (citations omitted).

The reasoning of the Court is plainly applicable in the instant case. When there is a federal constitutional claim involving a state regulation, that claim can be brought in federal court.

Numerous cases involving inverse condemnation and other land use issues have been brought in federal courts. See *supra* page 28 & note 13 (listing recent appellate cases). This Court has previously decided at least four zoning cases that were originally brought in federal court. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975) (§ 1983 case); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (§ 1983 case); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).¹⁵

These cases make clear the fundamental point that the Fifth and Fourteenth Amendments insure, at minimum, the right to make a claim for a taking of property.

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right. . . . In fact, a *fundamental interdependence* exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. *That rights in property are basic civil rights has long been recognized.*

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) (emphasis added) (federal court case challenging state garnishment statute under § 1983).

A. State Judicial Review Is Not a Prerequisite to a Federal Constitutional Claim

Hamilton brought this suit in federal court alleging, *inter alia*, that the planning commission had taken its property without just compensation. Hamilton sought judicial review in federal court only after it exhausted all avenues of relief before the commission and determined that any other efforts would be futile. See *supra* pages 10-13. The United

¹⁵ See Kanner, *Inverse Condemnation Remedies in an Era of Uncertainty* in Southwestern Legal Foundation, Proceedings of the Institute on Planning, Zoning, and Eminent Domain 177, 195-206 (1980); Rockwell, *Constitutional Violations in Zoning: The Emerging Section 1983 Damage Remedy*, 33 U. Fla. L. Rev. 168 (1981).

States urges that there is no deprivation of property without just compensation, however, until a state court determines that no compensation should be awarded.¹⁶

It is a long-standing rule of law that the existence of a state remedy does not preclude federal court consideration

¹⁶ The United States cites two Tennessee statutes that it claims provide an adequate state law remedy for Hamilton's takings claim: Tenn. Code Ann. § 27-9-101 and § 29-16-123. See Brief for the United States at 11, 16 & n.11. Section 27-9-101 provides for review of "any final order or judgment of any board or commission functioning under the laws of this state." Review under that section is accomplished by filing a petition for a common law writ of certiorari. The Tennessee Supreme Court held last year, however, that litigants "who seek review of zoning action taken by county or municipal authorities" must file declaratory judgment actions; the petition for common law writ of certiorari pursuant to § 27-9-101 is inappropriate in zoning actions. *Fallin v. Knox County Board of Commissioners*, 656 S.W.2d 338 (Tenn. 1983). A litigant cannot seek just compensation through a declaratory action. Therefore, the state remedy under *Fallin* is inadequate.

Section 29-16-123 allows an inverse condemnation action when "such person or company has actually taken possession of such land, occupying it for the purposes of internal improvement." The cases cited by the United States do not establish that inverse condemnation suits for regulatory takings, as opposed to suits based on actual possession of land, will lie under this statute. The statement to that effect by the Tennessee Court of Appeals in *Davis v. Metropolitan Government of Nashville and Davidson County*, 620 S.W.2d 532 (Tenn. App.), cert. denied (Tenn. 1981), is dicta and cites as support an earlier case in which the zoning challenge was brought not under § 29-16-123 but as a petition for a common law writ of certiorari. See *Bayside Warehouse Co. v. Memphis*, 63 Tenn. App. 268, 470 S.W.2d 375 (1971). Furthermore, the language of § 29-16-123 is not exclusive. The statute uses the permissive "may." Cf. *Rogers v. City of Nashville*, 40 Tenn. App. 170, 289 S.W.2d 868, cert. denied (Tenn. 1955).

Even if the remedies provided by Tennessee statute were available to Hamilton, there is no requirement that a plaintiff exhaust state remedies prior to filing a § 1983 action. *Henderson v. Bentley*, 500 F. Supp. 62, 63 (E.D. Tenn. 1980), aff'd, 698 F.2d 1219 (6th Cir. 1982) (no requirement to exhaust § 27-9-101).

where a federal constitutional violation is alleged. *Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913); see also *Monroe v. Pape*, 365 U.S. 167 (1961). To support its novel proposition, the United States seeks support in this Court's due process clause opinions, relying primarily on *Parratt v. Taylor*, 451 U.S. 527 (1981). But in the instant case, the issue is not due process but whether the zoning regulations as applied to Hamilton effected a taking for which just compensation is due.

Even if *Parratt* is viewed as applicable here, it still would not dictate that Hamilton's only remedy lay in state court. Central to the holding in *Parratt* was the fact that the deprivation of property was the result of a random act of negligence and did not occur as a result of some established state procedure. "The loss of property, although attributable to the State as action under color of law, is in almost all cases beyond the control of the State." *Parratt*, 451 U.S. at 541; see also *Hudson v. Palmer*, 104 S.Ct. 3194 (1984). The Court later held that post-deprivation remedies do not satisfy due process where the deprivation of property was caused by conduct pursuant to established state procedure, rather than random and unauthorized acts. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The loss of property here was not beyond the control of the state; rather, it was the result of a detailed state procedure governing regulation of land. This is just the situation in which recourse to federal courts was held proper in *Logan*.

Finally, upholding Hamilton's position in this case would not "make of the Fourteenth Amendment a font of [land use law and remedies]," as the United States brief misquotes *Parratt* as stating. Brief for the United States at 10. The taking issue affects only the application of a small number

of zoning regulations and is in no way relevant to most land use decisions.¹⁷

B. Administrative Remedies Were Exhausted

Hamilton was confronted with a planning commission that, beginning in 1979, adopted a "no-growth" policy (*supra* notes 3, 5; R. 54-60, 111-12, 244-45). The commission required Hamilton to provide fire protection, even though no such requirement was contained in the regulations. Hamilton complied by obtaining a commitment for a twenty year contract for fire protection. (R. 268). The commission requested that Hamilton eliminate certain cul-de-sacs, and Hamilton responded with a plan to eliminate the problem. (R. 266). The developer requested that a special committee be appointed to assist the developer in satisfying the commission's new demands. (R. 100). The special committee recommended waiving several of the commission's requirements (R. 486-87, 494), but the commission rejected this recommendation and continued to insist on full compliance. (R. 175-76). Other efforts were made by Hamilton, including a series of meetings with commission officials and submission of alternative plats to the commission. See *supra* pages 12-13. The record is totally devoid of any evidence indicating the planning commission was willing to approve *anything* in Temple Hills, regardless of how many concessions Hamilton made, until it became apparent to the commission at trial that it was going to lose the case. Only then did the county engineer indicate that the county might be willing to approve an "alternative" plan. That

¹⁷ The United States also cites *Agins* and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), incorrectly for the proposition that Hamilton was required to exhaust its state judicial remedies before seeking review in federal court. Brief for the United States at 11, 16. In *Agins*, of course, the zoning ordinance was merely challenged *on its face*, and the Court held that the mere enactment of the zoning ordinance did not constitute a taking. 447 U.S. at 260. The suit in *Hodel* was a *facial* challenge to a federal statute.

alternative was rejected by the jury, for obvious reasons, as a pretext. (R. 1431-32, 1451, 1455-57).

Petitioners also argue that *Agins* supports their contention that this case is not ripe for adjudication. In *Agins*, however, the zoning ordinance was merely challenged on its face, and the court held that the mere enactment did not constitute a taking. 447 U.S. at 260. In *Agins*, the property owners never submitted any development plans to the city; in this case, the on-going cluster subdivision had a seven year history of county approved preliminary plats, final plats, recordation of plats by the county, issuance of building permits, actual construction of some homes, and millions spent by the property owners to acquire the land and to build sewer lines, water lines, roads, etc. for the entire project. In *Agins*, the challenged zoning ordinance still permitted one to five houses on the subject property; in this case, nothing could be done with Hamilton's land. (Sixty-seven houses could be built, in theory, but the trial record makes clear, and the jury found, that it was economically impossible to do so.) In *Agins*, the case came to this Court only on the sustaining of a demurrer; in this case, an exhaustive trial was conducted, and the case was submitted to a jury.

In *Agins*, this Court expressly and narrowly held that the zoning on its face did not take appellant's property and, therefore, declined to address the inverse condemnation remedy issue. In this case, a regulatory taking clearly occurred, requiring that the inverse condemnation issue be squarely met.

Amici argue that Hamilton failed to seek a variance from the regulations. But the record establishes that the board of zoning appeals had already ruled that Temple Hills could continue to develop under the 1973 regulations, that the planning commission then refused to follow the decision of the board of zoning appeals, and that the county attorney indicated that any new appeal to the board of zoning appeals would be *futile*. *Supra* page 13. Additionally, through the series of approvals and reapprovals between

1973 and 1979, the commission had obviously granted *de facto* variances to the developers. The testimony is clear and unequivocal that the pre-1979 planning commission knew its own regulations, the nature of the development and the topography of the land. *Supra* pages 6-9. Although Hamilton made every effort to comply in good faith with the requirements of the post-1979 commission, Hamilton continued to rely upon previous commission approvals and the *de facto* variances that necessarily accompanied those approvals.¹⁸

Of course, there is no requirement that a plaintiff exhaust his administrative remedies before bringing a section 1983 action. *Patsy v. Board of Regents*, 457 U.S. 496 (1982); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Henderson v. Bentley*, 500 F. Supp. 62, 63 (E.D. Tenn. 1980), *aff'd*, 698 F.2d 1219 (6th Cir. 1982) (plaintiff need not exhaust remedies under Tenn. Code Ann. § 27-9-101 before bringing § 1983 suit). Be that as it may, Hamilton did everything possible to resolve the conflict with the commission before resorting to the delays and expense of court action.

C. Petitioners' Actions That Effected a Taking Were Authorized by State Law

The jury found that the planning commission was estopped under state law from applying new zoning regulations to Hamilton's development. The United States claims that this finding somehow means that the commission's actions

¹⁸ Petitioners contend remarkably that this case was rendered moot by the commission's approval of a preliminary plat pursuant to a settlement in March 1983 *after* the trial. Ignoring the fact that this settlement agreement was entered into for reasons that do not appear on the record, it should be noted that in the agreement the commission dropped most of the requirements it imposed between 1979 and 1983, including the limit on the number of units it would approve and the proscription against cluster units. The fact that the *estoppel* claim was settled and the appeal of that issue dismissed has *nothing* to do with the compensable *temporary* taking issue before this Court.

"were not authorized by state law," and thus they cannot give rise to a claim for just compensation. But the courts below only found the commission estopped from interfering with Hamilton's vested rights. They did *not* also find that the commission acted outside its authority; the commission won on the due process and equal protection issues. The United States completely misapplies cases like *Hooe v. United States*, 218 U.S. 322 (1910), and *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940).

There is no doubt that the planning commission was acting within the authority granted it by state statute to enact land use regulations, and that this authority was validly conferred. The United States contends, however, that if the commission acted in a manner inconsistent with *any* state law, no taking could occur. As the Sixth Circuit explained, this argument logically extended would result in there never being a taking without just compensation, since most state constitutions prohibit non-compensable takings. *Hamilton Bank*, 729 F.2d at 407 n.6, J.A. at 53 n.6. Neither case law nor common sense supports Petitioners' contention.¹⁹

¹⁹ Petitioners and amici also raise several additional arguments of a general nature. For example, the United States contends that no taking has been effected because the application of the regulations "did not require respondent to cease any *existing* use of the land in its unimproved state." Brief for the United States at 25. This argument is disingenuous. Until the application of the new regulations, the use of the subject property was residential. When the commission failed to reapprove the plat, the property was undevelopable and could not be used for residential (or any other) purposes.

Likewise deficient is the argument that there was no substantial change in the relevant provisions of the regulations between 1973 and 1981. It was not the words so much as the interpretation and application of the regulations that changed in 1979. As the Sixth Circuit noted, "[t]he plat was apparently in compliance under one interpretation of the zoning regulations, but not under an alternative interpretation." (729 F.2d at 403, J.A. at 45). It was the interpretation of the regulations as they were *applied* to Temple Hills by the post-1979 commission that resulted in the taking.

(Footnote continued on next page)

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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(Footnote 19 continued)

Amici imply that Hamilton purchased the property with knowledge that the commission had disapproved the plat. The record reveals, however, that Hamilton invested in the property in reliance on previous commission approvals (R. 789-90) and had purchased the property after the preliminary plat had been reapproved in 1978 under the original standards. Although the planning commission did reject the preliminary plat on October 2, 1980, on October 3, the secretary directed the developer to the board of zoning appeals and on November 11 the board of zoning appeals ruled that the 1973 regulations applied to Temple Hills. *Supra* pp. 11-12. It was *after* the board of zoning appeals decision and *before* any indication that the commission would not abide by the board's decision that Hamilton purchased the property on November 26, 1980.

Finally, some amici argue that Hamilton's losses were the result of a general decline in the housing industry. The record, however, reveals that Williamson County was the fastest growing county in Tennessee and that houses in this area were selling as fast as they could be built. (R. 928, 1627).

(17)
No. 84-4

Supreme Court, U.S.
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ALEXANDER L. STEVAS
CLERK

In The
Supreme Court of the United States
October Term, 1984

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners,
v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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No. 84-4

—o—
In The
Supreme Court of the United States
October Term, 1984
—o—

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,
Petitioners,
v.

HAMILTON BANK OF JOHNSON CITY,
Respondent.

—o—
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**
—o—

—o—
REPLY BRIEF FOR THE PETITIONERS
—o—

ARGUMENT

**I. Respondent Fails To Establish A Taking Under
The Just Compensation Clause.**

Hamilton, in its Brief on the Merits at page 11, states that August of 1979 was the first time the Planning Commission chose to apply changes in the regulations to the Temple Hills Development since it first approved a preliminary plat in 1973. Hamilton, as it has throughout the case, attempted to ignore the facts, and its refusal to even

address the questions presented in all of the briefs filed on behalf of the Planning Commission, tends to explain the ignorance of such facts by the Court of Appeals for the Sixth Circuit.

It is without question that the Planning Commission *never* gave approval to all of the areas in Temple Hills Development for which approval was sought, either in 1980 by a prior developer or in 1981 by Hamilton. The plats submitted in those years were the first plats ever submitted for consideration or approval by the Planning Commission which showed development in areas that had been specifically excluded under all prior approvals.

Additionally, 18.5 acres of the property which was included in the original preliminary plat approval had been removed from that development as a result of condemnation action by the state. Hamilton consistently ignored that fact even though the condemnation of the area required a completely new design for road layout and reduced the gross acreage of the development. Hamilton had always, at least until trial, taken the position that the condemnation and loss of the 18.5 acres should be totally ignored for the purpose of determining whether it has established any rights in the development of the property, under the original calculation.

In August of 1979, the preliminary plat was reapproved under the then current subdivision regulations and zoning ordinances. Most of the subdivision regulation amendments enacted from 1973 through 1979 provided only for upgrading of the type of road construction. Amendments to the zoning ordinance in 1977 required a 10% reduction of the land area to take into account the area used for roads (R. 77).

Hamilton also ignores the fact that the preliminary plat on which it relies was not reapproved every year in accordance with the subdivision regulations. The preliminary approval of June 19, 1975 was the last until April 20, 1978 (Pl. Ex. 9701, J.A. 423). There should be no question that any amendments made to the subdivision regulations prior to April 20, 1978 legally, logically and equitably apply to the development. It is only with regard to that area covered by the preliminary plat which never received final approval that there should be any question as to which regulations apply. The Planning Commission has never suggested that the areas which had received final plat approval and which were properly recorded could in any way be affected by any changes in the subdivision or zoning ordinances.

The most basic question to be determined by this Court is whether there are any rights established by Hamilton which have been so adversely affected by the action of the Planning Commission as to constitute a taking under the Just Compensation Clause of the Fifth Amendment. If the Bank has failed to establish such rights, then there can be no taking. The Bank continually assumes that it has certain rights, and merely addresses the question of compensation for taking of those rights.

To answer this question, this Court must make two threshold determinations which are: (1) whether the Respondent has alleged a Constitutional violation and (2) whether the action taken by the Planning Commission was

sufficiently final to constitute a "taking" at all. A Constitutional violation under the Just Compensation Clause is not alleged simply by showing that a state (or one of its subdivisions) has "taken" property. There is no question that it is lawful for the government to take property in order to carry out a public purpose. The Constitution is violated *only* if the state takes property "without just compensation". *Hurley v. Kincade*, 285 U.S. 95, 104 (1932); and *Ruckelshaus v. Monsanto Company*, 104 S. Ct. 2862 (1984).

The Courts below should not have retained respondent's suit as alleging a violation of the Just Compensation Clause because the Respondent, in its Complaint, alleged only that the Petitioner's action resulted in a taking of property in violation of the 14th Amendment (J.A. 16). The Respondent did not allege that the Planning Commission, as a subdivision of the State of Tennessee, failed to make compensation available for any purported taking. The Respondent attempts to sidestep this issue by ignoring the holding in *Davis v. Metropolitan Government of Nashville*, 620 S.W. 2d 532 (Tenn. App. 1981), which clearly indicates that an aggrieved party may recover in condemnation for unreasonable restriction on the use of property due to enactment of zoning laws. *Id.* at 534.

The Respondent has a duty to allege and prove that the state did not make compensation available. The Respondent dismisses the holding in *Davis* as only dicta (Resp. Br. 38 n 16), and certainly fails to carry the burden of proof. Not being content to simply ignore the obvious law in the State of Tennessee as set forth in the *Davis* case, the Respondent tenuously argues that the Tennessee Inverse Condemnation Statute (Tenn. Code Ann. §29-16-

123) is not an exclusive remedy because it contains the word "may". If compensation is available under the T.C.A. §29-16-123 for any taking that might have occurred, there is no Constitutional violation at all, and no basis for Respondent's suit in Federal Court under 42 U.S.C. § 1983 to remedy an alleged Constitutional violation. There being no completed Constitutional violation because there is a state remedy available, i.e. an inverse condemnation action, there should be no federal countenance of this action. For the same reason, Respondent's reliance on *Home Telephone and Telegraph Company v. City of Los Angeles*, 227 U.S. 278 (1913) in answering this argument is misplaced. That case concerns whether a person must seek judicial review in the State Court to correct action by a state administrative body that was allegedly in violation of substantive due process. The Court held that, in that setting, the Constitutional violation was complete when the administrative agent took the action, even if it was unauthorized by state law. *Accord Monroe v. Pope*, 365 U.S. 167 (1961). By contrast, there is no completed Constitutional violation at all when an administrative agency "takes" property if compensation is available for that taking in a judicial form.

The Respondent continually confuses the elements of a due process claim with those of a just compensation claim. The Respondent errs in attempting (Resp. Br. 39-40) to distinguish *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 104 S. Ct. 3194 (1984), which state the proposition in the context of a due process claim as opposed to a just compensation claim. Respondent argues that in *Parratt* and *Hudson* the random and unauthorized negligent or intentional acts of agents could

not be controlled by the state in advance, so the post deprivation process was adequate to satisfy the due process clause, while here, the "taking" was pursuant to an established state procedure. See *Logan v. Zimmerman Brush Company*, 455 U.S. 422 (1982). What Respondent overlooks is that under the due process clause there must be notice and opportunity for hearing before the deprivation; in *Parratt* and *Hudson* the Court recognized exceptions to that rule and held that post deprivation process was adequate. Under the Just Compensation Clause, by contrast, the Court has not established a general rule requiring that the government pay compensation (or provide an opportunity for hearing on the question of compensation) prior to the taking. The Court has consistently held, most recently in *Ruckelshaus v. Monsanto*, *supra*, that the government may take property first and pay compensation later. Moreover, and perhaps most importantly, Respondent's due process challenge to the Commission's action was rejected in the District Court, so it cannot now argue that the Commission's actions did not satisfy the standards in *Parratt* and *Hudson*.

Aside from the fact that the Respondent's allegations do not make out a Constitutional violation under the Just Compensation Clause, practical considerations support this conclusion as well. If Respondent's view is correct, any inverse condemnation action, i.e., any suit for compensation brought after a taking is alleged to occur, may be brought in Federal Court even if the state has also furnished a fully adequate inverse condemnation procedure. This Court has refused, and should continue to refuse as it did in *Parratt*, to "make of the 14th amendment a font of tort law to be superimposed upon whatever systems

may already be administered by the States". 451 U.S. at 544.

The Respondent cites (Resp. Br. 37) four Supreme Court zoning cases (*Young v. American Mini Theaters, Inc.*, *Warth v. Seldin*, *Village of Belle Terre v. Boraas*, and *Village of Euclid v. Ambler Realty Company*) in arguing that this Court should not be concerned about Federal Court involvement in this area. However, all of those cases cited by the Respondent involved a substantive challenge to zoning practices, based upon substantive due process claims, not upon claims for compensation in adverse condemnation. Those cases do not suggest that the Federal District Court should be converted into Claims Court to recover compensation from the states.

As has been indicated in the initial Brief on the Merits filed on behalf of the Petitioners (Pet. Br. 3-4), there existed in 1973 a two step procedure for approval of subdivisions. In 1973 an initial sketch plat was submitted to the Planning Commission for general preliminary approval. Subsequent to such approval a developer could submit final plats, section by section if he chose, containing significant engineering data to be approved by the Planning Commission and to be put on record. Once these final plats had been recorded the individual was free to develop the property and sell lots from the subdivision. Current procedure is substantially the same, although the initial sketch plat is now referred to as a preliminary sketch plat.

Hamilton also relies upon what it refers to as the "Grandfather Clause", as contained in the 1981 amendments to the subdivision regulations (Resp. Br. 10). Respondent claims that this clause provided that the De-

veloper of an ongoing project had the right to continue the project under the regulations that were in effect at the time of original approval. Actually the "Grandfather Clause" contained in the 1981 subdivision regulations at Article 2.2 provides as follows:

2.2 Savings Provision

These regulations shall not alter, modify, void, vacate or nullify any action now pending or any rights obtained by any person, firm or corporation by lawful action of the County prior to the adoption of these regulations.

Even assuming that the Savings Provision had some application to the Temple Hills Development, its only application could be those areas of the development which had received final plat approval, the final being the only plat that grants any rights to a developer. This would be pursuant to the Tennessee State Law and to the subdivision and zoning ordinances in effect in Williamson County. As this Court held in *Board of Regents v. Roth*, 408 U.S. 564 (1972), property interests "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits". *Id.* at 577. Assuming argumentatively that the Grandfather Clause would apply to the Temple Hills Development, then it is necessary to review the subdivision regulations that were in effect in 1973 when the first initial sketch plat was approved. The subdivision regulations then in effect at Section B.7 provided:

The approval of the preliminary sketch plat shall lapse unless the final plat based thereon is submitted

within one year from the date of such approval unless an extension of time is applied for and granted by the Planning Commission.

That provision of the subdivision regulations was amended on August 16, 1979 when the Planning Commission, in order to clarify the procedures for reapproval adopted an amendment to Section B.7 by adding the following sentence thereto:

Renewal shall be granted if the preliminary plat meets regulations and situation at time of renewal.

It is important to note that this amendment was made to the subdivision regulations prior to the time the preliminary plat for the Temple Hills Development was approved on August 16, 1979 (P. Ex. 1073 J.A. 279). This is a fact of which the Bank had knowledge prior to the time it acquired the property.

Assuming that the 1981 subdivision regulations and the Grandfather Clause require that regulations in effect at the time the preliminary plat for Temple Hills was reapproved apply, then the regulations in effect in 1979 at which time the preliminary plat was reapproved would apply. If, however, the 1981 regulations and the Savings Clause require that the 1973 regulations be applied to the Temple Hills Development, those regulations should be applied only to the areas which had been approved in 1973. Those areas that were marked as excluded from the development on the preliminary plat, which had been reapproved several times through 1979, have never been approved. Both Hamilton and the Sixth Circuit erroneously ignored the fact that several areas within the development were specifically excluded under all prior approvals. There can be no valid legal theory under which

the Bank can claim rights to develop areas of the Temple Hills Development that were specifically excluded from all prior approvals. There can be no interpretation of the following language other than its clear, plain meaning:

"THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION" and

"PARCELS WITH NOTE 'THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION' NOT A PART OF THIS PLAT AND NOT INCLUDED IN GROSS AREA."

The language that was contained on the preliminary plat approved in 1973 and on the plat as reapproved from time to time through 1979 was plain and unequivocal. There can be no question as to its meaning.

In addition, the plats also contain the language:

Actual dwelling units presented this initial sketch plan 469 (Pl. Ex. 9700, J.A. 422).

The only approval ever received by any developer in 1973 would have been for 469 dwelling units to be constructed on areas not specifically excluded from that plat. It must remain clear, however, that only final platted and approved sections which are recorded in accordance with Tennessee law vest any rights in the developer.

As has been previously stated, only in 1980 did a *new* proposed plat show that the remaining property which had been specifically excluded from all prior preliminary approvals was intended for development. This was the first time the Planning Commission ever saw the effect of the condemnation of 18.5 acres (referred to as Natchez Trace take) on the development. A road originally pro-

posed on the preliminary plats that has been previously approved to loop through the area was now cut, which resulted in excessively long cul-de-sacs. One cul-de-sac was in excess of 5,000 feet, the other in excess of 3,000 feet. (Pl. Ex. 9702 J.A. 425). This new development, first presented to the Planning Commission in 1980, was in absolute violation of both the 1973 regulations as well as those later in effect. The 1973 regulations provided for cul-de-sacs of only 400 feet, (Def. Ex. 110), whereas the 1981 subdivision regulations allow cul-de-sacs of 800 feet. (Pet. Ex. 112). Both regulations provided for variances to the cul-de-sacs lengths in certain instances. However neither the Bank nor its predecessor, both represented by the former County Planner, Mr. Tom Ragsdale, ever sought a variance as to the cul-de-sac problem first presented to the Planning Commission on the preliminary plat in 1980 or 1981 (R. 1181, 1184, 1204-1205).

II. This Action Is Not Ripe For Adjudication Because Of Respondent's Failure To Pursue Its Administrative Remedies.

The concept of taking usually connotes a formal acquisition of the property by a governmental entity, or at least a divesting by that state entity of a property interest belonging to a private person or entity. Such a "taking" occurs only when, in the regulatory setting, the state agency has taken formal and *final* action. The Petitioner's preliminary or interlocutory rejection of a particular proposal for an extension of the development, which occurred in June 1981, did not constitute a formal and final determination to restrain any further development on the property in question. Again, the Respondent uses the term "taking" in this instance to connote an abuse of

governmental power, the sort of conduct addressed by the Due Process Clause and not the Just Compensation Clause.

The Respondent states that it did all it could to seek approval of its plan for development. In fact, the opposite is true. The Respondent insisted that the Petitioner approve at least the 736 dwelling units that were shown to have been originally approved on the first preliminary plat. Only after it was pointed out to the Respondent that the 18.5 acres had been taken from the development did they concede at all on that number.

While the Respondent, through its employee, Tom Ragsdale, admits that the prior developer was told in January of 1980 to revise his plat (R. 92), this was never done. Although Mr. Ragsdale testified that he told the County Planner that he would work with him to improve the plat (R. 110, J.A. 84), this never occurred either.

Mr. Killebrew, a representative of the Respondent, testified that he did not believe even after the time suit had been filed that he had sufficient engineering data to determine if there were any problems with slope on the property (R. 842). Further, Mr. Killebrew admits that although the cul-de-sac problem was known to the Respondent, no plan to correct the problem had ever been submitted to the Planning Commission (R. 846). Killebrew testified that the Respondent thought they still had enough room to loop the roads around the golf course, but because of a problem caused by survey error which became known to them in August of 1982, they could not do so (R. 855). It should also be noted that this information was known to the Bank prior to the time it acquired the property at foreclosure.

Although there were negotiations between the Planning Commission and the Respondent and prior developer in an attempt to work out some of the problems, the Respondent and the prior developer flatly refused to submit a plat which even attempted to correct any of the problems (R. 1181). The Respondent also would have been required to obtain waivers of the zoning ordinances but never attempted to do so (R. 1184, 1204 J.A. 217). (See also testimony of Ann Peterson R. 1702 and 1706 J.A. 222; also testimony of Robert Medaugh R. 1816).

III. The Jury Verdict Cannot Be Interpreted, As A Matter Of Law That There Had Been A "Taking" Under The Just Compensation Clause.

Hamilton suggests that the jury verdict in this case supports the finding that there had been a taking (Resp. Br. 24-27). Careful examination of the jury verdict, and perhaps a more careful examination of the Sixth Circuit majority opinion, reveals that the jury verdict does not substantiate the finding that there had been a taking compensable under the Fifth Amendment. The jury was given interrogatories by the Court on which to make certain responses. The Petitioners objected to these form interrogatories because they were not sufficiently complete for the jury to make a proper finding as to the factual issues before the Court. In particular, they were not specific enough to determine whether or not there had been a deprivation of economic use in order to constitute a taking. Particularly, the Court instructed the jury to determine:

1. Are the Defendants estopped from requiring the Plaintiff to comply with the present zoning regulations as opposed to the 1973 regulations?

To this interrogatory the jury responded—yes.

The jury's response, as interpreted by the District Court, was simply that Hamilton would have been entitled to proceed to have approved a preliminary plat *which conformed* with the 1973 regulations. The finding as to the estoppel issue certainly should not be interpreted to mean that either Hamilton or any prior developer had in 1980 or 1981 any vested rights to develop the property other than in conformity with the 1973 regulations. The real problem in this case is that Hamilton could not develop the remaining land in accordance with the 1973 zoning ordinances, or at least it did not want to attempt to, because it never submitted a plan which conformed to those subdivision regulations and zoning ordinances. (R. 1173, J.A. 216).

To interpret the jury's finding on the estoppel question in any other fashion would be to find that Hamilton had obtained vested rights to develop the remaining land and totally disregard the facts that much of the land sought to be developed in 1980 and 1981 was specifically excluded from approval in all prior years. It would also require the ludicrous finding that Hamilton had a vested right to develop the property without regard to the fact that 18.5 acres of the original development was no longer a part of the development, and would totally ignore the effect of that removal of 18.5 acres upon the development. The development could not proceed under the preliminary plat that was approved in 1973 because of the loss of the 18.5 acres. Simply stated, until the Bank submitted a preliminary plat covering the new area and reflecting the changes resulting from the loss of 18.5 acres and the survey error, and conforming with the 1973 regulations,

there could be no taking. The Bank having failed to make that application cannot claim a taking. As the District Court judge finally ruled, until there has been a submission to the Planning Commission, it being required to apply the 1973 standards, or until it violates the Court's ultimate injunction, there could not be found to be a taking. The District Court realized this in its final ruling granting the Petitioner's Motion for Judgment Notwithstanding the Verdict, and set forth in the Judgment of Permanent Injunction language requiring the Petitioners to apply only the applicable regulations in effect in 1973. The Court, realizing the fact that there had never been a plat submitted for approval which could meet the 1973 standards, did as a matter of law set aside the jury's finding that there had been a compensable taking because there had yet to be established a taking. The District Court in its memorandum states:

However, legitimate technical questions of whether Plaintiff meets the requirements of the 1973 regulations are capable of resolution through applicable state and local procedures of appeal. See e.g. Tennessee Code Annotated § 13-7-08. This Court should not attempt to assume the function of a "Court of Zoning Appeals" to resolve every question of technical application of the 1973 regulations. See *Kent Island Joint Venture v. Smith*, 452 F. Supp. 455, 464 (D.Md. 1979) (J.A. 42).

It is therefore obvious that the District Court contemplated further proceedings by Hamilton before the Planning Commission and the submission of a plan to the Planning Commission that comported with the 1973 regulations.

The fallacy of the Bank's position, as well as the majority opinion of the Sixth Circuit Court of Appeals, is an

assumption that the mere imposition of the amended regulations constituted a taking. It is clear that approval of the plat as submitted was not possible because it contained numerous violations of the 1973 regulations. Until a plan was submitted to the Planning Commission which reflected the new changes to the property, which at a minimum complied with the 1973 regulations, and that plan turned down by the Planning Commission there could be no taking. There had never been any approval of some of the area sought to be developed by Hamilton in 1981. It is totally illogical to say that Hamilton had vested rights taken when it could never establish any rights in the land specifically excluded from approval, and it is equally illogical for Hamilton to argue that a preliminary plat established rights when the situation had been drastically changed as a result of the Natchez Trace take. To hold otherwise would allow a developer of land to challenge any and all regulations if the otherwise valid application of those regulations would in any way reduce the economic viability of use, even where that reduction is primarily the result of the physical characteristics of the property. Justice Brennan, in the dissent in the *San Diego Gas and Electric Company v. City of San Diego*, 450 U.S. 621 (1981) case, required the establishment of a *regulatory taking* before "the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the 'taking' and ending on the date the government entity chooses to rescind or otherwise amend the regulations." *Id.*, at 653. It is required that the Bank must, at a minimum, submit a preliminary plat that conforms with the 1973 regulations before any application by the Planning Commission of any regulations can effect

"regulatory taking." There can be no taking in this case considering the facts, and therefore there is no need to consider whether the economic viability has been affected, and the investment backed expectations of the Bank interfered with.

The District Court's decision, although perhaps not as lengthy or articulate as it might have been, does reach the correct holding. Until the Planning Commission receives a Plat that is in substantial compliance with the 1973 regulations, it cannot be found that there has been any regulatory taking or interference with economically viable use of the property.

The Bank in its brief wrongfully misleads this Court by stating the following:

"The evidence is clear and convincing that at least under the pre 1979 Commission's interpretation of the regulations, Hamilton complied fully."

Such conclusion tends to imply that there were vested rights in *all* land sought to be developed, and is intellectually dishonest. *Never* had a plat been submitted to the Planning Commission pre or post 1979 which approved for development of all the areas that originally contained the note: "THIS PARCEL NOT TO BE DEVELOPED UNTIL APPROVED BY THE PLANNING COMMISSION."

The Bank's assertion that it had vested rights to develop the property is totally unfounded. Failure to establish such rights precludes the finding that there is a taking. If the Bank had submitted a plat substantially in compliance with the 1973 regulations, and if the Planning Commission had turned it down by applying other regulations,

then perhaps there would a judiciable issue before this Court. The Bank has not resubmitted a plat similar to that plat submitted in 1973. In fact, it submitted a totally new plat for consideration and approval. The new plat submitted by a prior developer in 1980 was the first to show the effect of the Natchez Trace take. The submissions up to 1979 were patently wrong. When in 1980 a plat was submitted that did reflect the real situation, i.e., the loss of 18.5 acres, the Planning Commission correctly refused to approve that plan. This disapproval could have been based as easily upon the 1973 regulations as upon the 1980 or 1981 regulations. The Bank insists that the Planning Commission, and this Court, ignore reality and grant it the right to proceed when in fact it never had the right to proceed.

Respondent's brief suggests that the majority of the Sixth Circuit declared that the jury determined that the Bank had acquired a vested right to develop Temple Hills (Resp. Br. 21). The Bank, as well as the majority of the Sixth Circuit, find implications in the jury's response to the District Court's interrogatories which should not be implied. The reference by the majority of the Court of Appeals is to the estoppel issue and not the taking issue. The Court states that "The jury, must, therefore, have found that Hamilton had acquired a right to develop Temple Hills according to the plat that had been submitted." (J.A. 53). The Court of Appeals refers to "approved plans for the development". It should be noted that the only plans for the development that were ever submitted in 1981 contained areas that had been specifically excluded under *all* prior preliminary approvals. The Court of Appeals majority totally ignores the fact that the Bank was

seeking approval for areas never approved by the Planning Commission. The Court of Appeals must have failed to review the plats as submitted in 1980 and 1981, because it is obvious that they were totally different from those submitted in 1973, and covered areas previously specifically excluded. The jury's own finding was that the Bank could proceed to develop under the 1973 regulations. There was no finding that the Respondent had vested rights to proceed under the plats submitted in 1980 or 1981. As has been stated before, there could be no finding of a taking which is subject to compensation until a plat had been submitted by the Bank which comports with at least the 1973 regulations. Once such a plat had been submitted, if the Planning Commission refused to approve it, then the issue may be ripe for judicial action. This was never done prior to filing suit.

For the same reasons stated above, the majority of the Court of Appeals also fails in its economic analysis of the degree of interference with investment backed expectations. Again the investment backed expectations analysis should only be made once the Bank has established some reasonable basis upon which to base its investment backed expectations. Certainly it cannot be found that the Bank could have investment backed expectations as to property which had been specifically excluded under all preliminary plat approvals of the development. Nor should the Bank be found to have any investment backed expectations as to the 18.5 acres which had been removed from the development. This, however, is the position of the Respondent. These facts, taken together with the fact that the Bank had knowledge that in 1979 the preliminary plat had been reapproved subject to all of the regulations

then in effect, plus the fact that in 1980 a plat similar to the one submitted by it in 1981 had been rejected, certainly indicate that there could be no proper finding that the Bank had any valid investment backed expectations at the time it purchased the property.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and the District Court's Judgment Notwithstanding the Verdict should be reinstated.

Respectfully submitted,

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